No. 15-457

Title:	Microsoft Corporation, Petitioner v. Seth Baker, et al.
Docketed:	October 13, 2015
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(12-35946)
Decision Date:	July 20, 2015

Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Oct 9 2015	Petition for a writ of certiorari filed. (Response due November 12, 2015)
Oct 28 2015	Order extending time to file response to petition to and including December 14, 2015.
Oct 28 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Nov 11 2015	Brief amici curiae of Washington Legal Foundation, et al. filed.
Nov 12 2015	Brief amicus curiae of Product Liability Advisory Council, Inc. filed.
Nov 12 2015	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Nov 12 2015	Brief amicus curiae of DRI-The Voice of the Defense Bar filed.
Dec 14 2015	Brief of respondents Seth Baker, et al. in opposition filed.
Dec 22 2015	DISTRIBUTED for Conference of January 8, 2016.
Dec 22 2015	Reply of petitioner Microsoft Corporation filed. (Distributed)
Jan 11 2016	DISTRIBUTED for Conference of January 15, 2016.
Jan 15 2016	Petition GRANTED limited to the following Question: Whether a federal court of appeals has jurisdiction under both Article III and 28 U. S. C. 1291 to review an order denying class certification after the named plaintiffs voluntarily dismiss their individual claims with prejudice.
Feb 23 2016	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents.
Mar 2 2016	The time to file the joint appendix and petitioner's brief on the merits is extended to and including March 11, 2016.
Mar 2 2016	The time to file respondents' brief on the merits is extended to and including May 16, 2016.
Mar 11 2016	Joint appendix filed.
Mar 11 2016	Brief of petitioner Microsoft Corporation filed.
Mar 17 2016	Brief amicus curiae of DRI-The Voice of the Defense Bar filed.
Mar 17 2016	Brief amicus curiae of Pacific Legal Foundation filed.
Mar 18 2016	Brief amici curiae of Washington Legal Foundation, et al. filed.
Mar 18 2016	Brief amicus curiae of Product Liability Advisory Council, Inc. filed.
Mar 18 2016	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
Mar 18 2016	Brief amici curiae of Civil Procedure Scholars filed.
May 16 2016	Brief of respondents Seth Baker, et al. filed.
May 23 2016	Brief amicus curiae of Public Justice, P.C. filed.

May 23 2016	Brief amici curiae of Complex Litigation Law Professors filed.
May 23 2016	Brief amicus curiae of Public Citizen, Inc. filed.
Jun 15 2016	Reply of petitioner Microsoft Corporation filed.
Feb 3 2017	SET FOR ARGUMENT on Tuesday, March 21, 2017
Feb 3 2017	Record requested from the U.S.C.A. 9th Circuit.
Feb 6 2017	Record received from the U.S.C.A. 9th Circuit. The record is electronic and available on PACER. Also received SEALED pleadings.
Feb 9 2017	CIRCULATED.
Mar 21 2017	Argued. For petitioner: Jeffrey L. Fisher, Stanford, Cal. For respondents: Peter K. Stris, Los Angeles, Cal.
Jun 12 2017	Judgment REVERSED and case REMANDED. Ginsberg, J., delivered the opinion of the Court, in which Kennedy, Breyer, Sotomayor, and Kagan, JJ., joined. Thomas, J., filed an opinion concurring in the judgment, in which Roberts, C. J., and Alito, J., joined. Gorsuch, J., took no part in the consideration or decision of the case.
Jul 14 2017	JUDGMENT ISSUED

~~Name~~~~~~~~~~~~~~~~~~~~~~~~	~~~~~~~~Address~~~~~~~~~~~~~~~~~~~~	~~Phone~~~~
Attorneys for Petitioner:		
Stephen M. Rummage Counsel of Record	Davis Wright Tremaine, LLP 1201 Third Avenue, Suite 2200 Seattle, WA 98101-3045 steverummage@dwt.com	(206) 622-3150
Party name: Microsoft Corporation		
Jeffrey L. Fisher	Stanford Law School Supreme Court Litigation Clinic 559 Nathan Abbott Way Stanford, CA 94305-8610 jlfisher@law.stanford.edu	(650) 724-7081
Party name: Microsoft Corporation		
Attorneys for Respondents:		
Brendan S. Maher Counsel of Record	Stris & Maher LLP 6688 N. Central Expy., Ste. 1650 Dallas, TX 75206 brendan.maher@strismaher.com	(213) 995-6805
Party name: Seth Baker, et al.		
Darren T. Kaplan	Stueve Siegel Hanson, LLP 1359 Broadway, Suite 2001 New York, NY 10018 kaplan@stuevesiegel.com	(212) 999-7370
Party name: Seth Baker, et al.		
Peter K. Stris	Stris & Maher LLP 725 S. Figueroa St., Ste. 1830 Los Angeles, CA 90017	(213) 995-6800

peter.stris@strismaher.com

Party name: Seth Baker, et al.

Other:

Cory L. Andrews — Washington Legal Foundation, 2009 Massachusetts Avenue, N.W., Washington, DC 20036, candrews@wlf.org, (202) 588-0302

Party name: Washington Legal Foundation, et al.

John H. Beisner — Skadden Arps Slate Meagher & Flom LLP, 1440 New York Avenue, NW, Washington, DC 20005, John.Beisner@skadden.com, (202) 371-7000

Party name: Product Liability Advisory Council, Inc.

Rishi Bhandari — Mandel Bhandari LLP, 80 Pine Street, 3rd Floor, New York, NY 10005, rb@mandelbhandari.com, (212) 269-5600

Party name: Complex Litigation Law Professors

Deborah J. La Fetra — Pacific Legal Foundation, 930 G Street, Sacramento, CA 95814, dlafetra@pacificlegal.org, (916) 419-7111

Party name: Pacific Legal Foundation

Jason L. Lichtman — Lieff Cabraser Heimann & Bernstein LLP, 250 Hudson Street, 8th Floor, New York, NY 10013, jlichtman@lchb.com, (212) 355-9500

Party name: Public Justice, P.C.

Mary Massaron — Plunkett Cooney, 38505 Woodward Avenue, Suite 2000, Bloomfield Hills, MI 48304, mmassaron@plunkettcooney.com, (248) 901-4000

Party name: DRI-The Voice of the Defense Bar

Mark W. Mosier — Covington & Burling LLP, One City Center, (202) 662-6000

850 Tenth
Street, NW
Washington, DC 20001
mmosier@cov.com

Party name: Chamber of Commerce of the United States of America, et al.

Adina H. Rosenbaum — Public Citizen Litigation Group — (202) 588-1000
1600 20th Street, NW
Washington, DC 20009
arosenbaum@citizen.org

Party name: Public Citizen, Inc.

E. Joshua Rosenkranz — Orrick, Herrington & Sutcliffe LLP — (212) 506-5000
51 West 52nd Street
New York, NY 10019-6142
jrosenkranz@orrick.com

Party name: Civil Procedure Scholars

RECORD AND BRIEFS

15-457

Supreme Court, U.S.
FILED
OCT - 9 2015
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

v.

SETH BAKER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Bradford L. Smith
David M. Howard
Timothy G. Fielden
Microsoft Corporation
One Microsoft Way
Redmond, WA 98052

Charles B. Casper
Montgomery, McCracken
Walker & Rhoads, LLP
123 South Broad Street
Philadelphia, PA 19109

Stephen M. Rummage
Counsel of Record
Fred B. Burnside
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101
(206) 622-3150
steverummage@dwt.com

Jeffrey L. Fisher
559 Nathan Abbott Way
Stanford, CA 94305

QUESTION PRESENTED

Whether a federal court of appeals has jurisdiction to review an order denying class certification after the named plaintiffs voluntarily dismiss their claims with prejudice.

PARTIES TO THE PROCEEDINGS

The sole petitioner here (defendant below) is Microsoft Corporation.

In addition to the plaintiff-respondent identified on the cover, Jesse Bernstein, Matthew Danzig, James Jarrett, Nathan Marlow, and Mark Risk were also named plaintiffs below. With the exception of Jesse Bernstein, who dismissed his appeal, these individuals are also respondents here.

RULE 29.6 STATEMENT

Microsoft Corporation, a publicly traded company, has no corporate parent, and no publicly held company has an ownership interest of more than ten percent.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

RULE 29.6 STATEMENT iii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

I. The Federal Courts Of Appeals Are Divided Over Whether Plaintiffs May Appeal An Order Denying Class Certification After Voluntarily Dismissing Their Claims With Prejudice. 9

II. The Question Presented Is Exceptionally Important. 13

III. This Case Is A Particularly Suitable Vehicle For Resolving The Question Presented. 17

IV. The Ninth Circuit's Decision Is Wrong. 19

CONCLUSION 23

APPENDIX

Appendix A, Order and Amended Opinion of the U.S. Court of Appeals for the Ninth Circuit 1a

Appendix B, District Court Stipulation and Order Granting Plaintiffs' Motion to Dismiss with Prejudice 35a

TABLE OF AUTHORITIES

Page(s)

Cases

AT&T Mobility LLC v. Concepcion,
131 S. Ct. 1740 (2011) 15

Baker v. Microsoft Corp.,
851 F. Supp. 2d 1274 (W.D. Wash. 2012).....5

Bd. of Sch. Comm'rs v. Jacobs,
420 U.S. 128 (1975) 23

Berger v. Home Depot USA, Inc.,
741 F.3d 1061 (9th Cir. 2014).....6, 12, 13, 19

Bobbitt v. Milberg LLP,
___ F.3d ___, 2015 WL 5255081
(Sept. 10, 2015).....16

Bowe v. First of Denver Mortg. Investors,
613 F.2d 798 (10th Cir. 1980).....10, 12, 21

Camesi v. Univ. of Pittsburgh Med. Ctr.,
729 F.3d 239 (3d Cir. 2013).....10

Chamberlan v. Ford Motor Co.,
402 F.3d 952 (9th Cir. 2005).....17

Chavez v. Illinois State Police,
251 F.3d 612 (7th Cir. 2001).....10

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) .....*passim*

Druhan v. Am. Mut. Life,
166 F.3d 1324 (11th Cir. 1999) 11

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974) 16

Ewert v. Ebay, Inc.,
No. 07-CV-2198, 2010 WL 4269259
(N.D. Cal. Oct. 25, 2010) 14

Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
903 F.2d 176 (2d Cir. 1990), *cert. denied*, 498 U.S. 1025 (1991) 12, 20

Genesis Healthcare Corp. v. Symczyk,
133 S. Ct. 1523 (2013) 22

Henson v. Fid. Nat'l Fin., Inc.,
No. 14-56578 (9th Cir.), 2015 WL
4537372 17

Himler v. Comprehensive Care Corp.,
993 F.2d 1537 (4th Cir. 1993) 10

Huey v. Teledyne, Inc.,
608 F.2d 1234 (9th Cir. 1979) 12

Hutchins v. A.G. Edwards & Sons, Inc.,
116 F.3d 1256 (8th Cir. 1997) 12

Kay v. Online Vacation Ctr. Holdings Corp.,
539 F. Supp. 2d 1372 (S.D. Fla. 2008) 11

In re The NVIDIA GPU Litig.,
539 F. App'x 822 (9th Cir. 2013) 16

Palmieri v. Defaria,
88 F.3d 136 (2d Cir. 1996).....13, 20

Parker v. Time Warner Entm't Co.,
331 F.3d 13 (2d Cir. 2003).....16

Rhodes v. E.I. DuPont de Nemours & Co.,
636 F.3d 88 (4th Cir.), *cert. denied*, 132
S. Ct. 499 (2011) 10, 23

Shannon v. General Elec. Co.,
186 F.3d 186 (2d Cir. 1999).....13

Smith v. Bayer Corp.,
131 S. Ct. 2368 (2011) 5

Smith v. Microsoft Corp.,
No. 14-55807 (9th Cir. Mar. 30, 2015).....17

Stearns v. Ticketmaster, Inc.,
655 F.3d 1013 (9th Cir. 2011) 19

U.S. Parole Comm'n v. Geraghty,
445 U.S. 388 (1980) 22

Wal-Mart Stores, Inc. v. Dukes,
131 S. Ct. 2541 (2011) 16

Wolin v. Jaguar Land Rover North Am., LLC,
617 F.3d 1168 (9th Cir. 2010).....4, 5, 7

Woodard v. STP Corp.,
170 F.3d 1043 (11th Cir. 1999) 11

Constitutional and Statutory Provisions

U.S. Const. art. III 1, 9, 11, 13, 22

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 .....1, 9, 11

28 U.S.C. § 1292(b) 22

28 U.S.C. § 1292(e) 1

Fed. R. Civ. P. 23 .....passim

Other Authorities

HON. A. WALLACE TASHIMA & JAMES M. WAGSTAFFE, FEDERAL CIVIL PROCEDURE BEFORE TRIAL § 16:396 (2015) 9

John Beisner et al., *Study Reveals US Courts of Appeals Are Less Receptive to Reviewing Class Certification Rulings* 18

THOMAS SMITH & ELIZABETH WILLIAMS, 6 CYCLOPEDIA OF FEDERAL PROCEDURE § 23.46 (3d ed. 2015) 9

PETITION FOR A WRIT OF CERTIORARI

Petitioner Microsoft Corporation respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in No. 12-35946.

OPINIONS BELOW

The amended opinion of the Ninth Circuit (Pet. App. 1a) is published at 797 F.3d 607. The relevant order of the district court (Pet. App. 35a) is unpublished.

JURISDICTION

The Ninth Circuit issued its initial decision on March 18, 2015. The Ninth Circuit issued an amended opinion, simultaneously denying Microsoft's petition for rehearing en banc, on July 20, 2015. Pet. App. 1a, 5a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 2 of the United States Constitution provides in relevant part: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States," and to certain "controversies."

28 U.S.C. § 1291 provides in relevant part: "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . .."

28 U.S.C. § 1292(e) provides: "The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an

interlocutory decision to the courts of appeals that is not otherwise provided under subsection (a), (b), (c), or (d)."

Federal Rule of Civil Procedure 23(f) provides in relevant part: "A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered."

STATEMENT OF THE CASE

This case presents an important jurisdictional issue concerning class-action procedure that is now the subject of an entrenched circuit split.

1. In 2005, petitioner Microsoft Corporation released the Xbox 360 console. Widely popular with video game enthusiasts, the Xbox 360 became the first console of its generation to sell over ten million units in the United States. Among other things, the Xbox 360 spins game discs in its disc drive faster than its competition, creating "a better overall video-gaming experience." CA9 ER 219.

But like any device, the Xbox 360 has limits. As with turntables that spin vinyl records, the Xbox 360 may scratch discs spinning inside if moved too quickly in the wrong direction during operation. Microsoft therefore affixed a sticker on the front of each disc drive—covering the disc tray before first use—telling users in three languages: "Do not move console with disc in tray." And Microsoft's warranty promises only that, "under normal use and service," the Xbox 360 "will conform to the printed user instruction materials," CA9 ER 544; the user instruction materials in turn warn users to "[r]emove

discs before moving the console or tilting it between the horizontal and vertical positions" to avoid "damaging discs," CA9 ER 106, 273, 278.

In the years since the Xbox 360 went on sale, "only 0.4% of Xbox users have reported disc scratching." Pet. App. 6a.

2. In 2007—five years before this case was filed—seven Xbox 360 owners sued Microsoft in separate lawsuits, alleging "the Xbox optical disc drive is unable to withstand even the smallest of vibrations, and that during normal game playing conditions discs spin out of control and crash into internal components, resulting in scratched discs that are rendered permanently unplayable." Pet. App. 6a. Those plaintiffs sought damages both for game owners whose discs were scratched and for *all* Xbox 360 owners, on the theory that the console's supposed propensity to malfunction reduced the value of *all* Xboxes, thus breaching express and implied warranties.

Five cases were consolidated in the U.S. District Court for the Western District of Washington. After the parties developed a full evidentiary record, including expert testimony, through sixteen months of active discovery, the district court denied class certification. It began by noting that "the defect asserted by the Xbox owners actually manifest[ed] in fewer than one percent of the total number of consoles purchased." Pet. App. 7a (alteration in original; internal quotation marks omitted). The district court then reasoned that the need to consider causation and damages on an individual basis for consoles that allegedly scratched discs "preclude[d] the certification of the class of Xbox owners" and the

scratched-disc subclass. *Id.* 8a (alteration in original; internal quotation marks omitted).

The plaintiffs filed a petition in the Ninth Circuit seeking interlocutory review under Fed. R. Civ. P. 23(f). Rule 23(f) gives federal courts of appeals "unfettered discretion" to "permit an appeal from an order granting or denying class-action certification." Fed. R. Civ. P. 23(f); Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment. They argued the class-certification denial "constitute[d] the 'death knell' for this litigation" because the individual claims were too small to justify litigating on their own to final judgment. Pet. for Permission to Appeal Under Fed. R. Civ. P. 23(f) at 8. The Ninth Circuit denied the petition, CA9 ER 231, and the plaintiffs resolved their individual claims by an agreement with Microsoft. The district court then dismissed the consolidated cases with prejudice.

3. In 2011, the same lawyers as in the original consolidated litigation filed a new lawsuit—again in the U.S. District Court for the Western District of Washington—on behalf of respondents, a handful of Xbox 360 owners who did not sue in 2007. Respondents pressed the same claims as their predecessors and they likewise requested certification of a nationwide console class.[1] They argued the Ninth Circuit's intervening decision in

---

[1] Respondents originally sought to certify a scratched-disc subclass as well. But they abandoned the scratched-disc subclass on appeal, Pltfs. CA9 Br. 18-20, recognizing their inability to prove on a classwide basis that the console, as opposed to user behavior, caused any particular disc scratch.

Wolin v. Jaguar Land Rover North America, LLC, 617 F.3d 1168 (9th Cir. 2010)—holding that proof of the manifestation of a defect is not a prerequisite to class certification and the typicality requirement in Fed. R. Civ. P. 23 "can be satisfied despite different factual circumstances surrounding the manifestation of the [alleged] defect," *id.* at 1175—now allowed certification of their proposed classes.

Microsoft replied that *Wolin* did not change the law relevant to this case. As a result, Microsoft maintained, the district court should show comity to the decision in the earlier case, which rested on the same allegations as this one. *See Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2381 (2011) ("[W]e would expect federal courts to apply principles of comity to each other's class certification decisions when addressing a common dispute."). Further, Microsoft explained, *Wolin* does not apply where, as here, only a minuscule fraction of the proposed class suffered any harm in the form of a manifestation of an alleged defect, and individual proof is necessary to determine whether any particular user's warranty was breached.

The district court struck respondents' class allegations. It found the reasoning in the first denial of class certification (by a different judge) persuasive and that "nothing in *Wolin* undermine[d] [that] causation analysis." *Baker v. Microsoft Corp.*, 851 F. Supp. 2d 1274, 1280 (W.D. Wash. 2012).

4. Invoking Fed. R. Civ. P. 23(f), respondents sought immediately to appeal the district court's order striking their class allegations. As in the previous case, respondents' counsel asserted that "[t]he small size of Plaintiffs' claims makes it

economically irrational to bear the cost of litigating this case to final judgment," such that, unless reversed, "the district court's order effectively kills this case." Pet. for Permission to Appeal Under Fed. R. Civ. P. 23(f) at 18.

Relying on its unfettered discretion to grant or deny Rule 23(f) petitions, the Ninth Circuit denied the petition, and remanded the case back to the district court. Pet. App. 10a.

5. Instead of pressing their individual claims, respondents promptly moved on remand to dismiss their claims with prejudice. Respondents explained why they wanted such an order: "After the Court has entered a final judgment, Plaintiffs intend to appeal the Court's March 27, 2012 order (Dkt. 32) striking Plaintiffs' class allegations." Pet. App. 36a.

Microsoft stipulated that the district court could dismiss respondents' claims. Pet. App. 36a. Microsoft made clear, however, that it believed "Plaintiffs will have no right to appeal the Court's Order striking Plaintiffs' class allegations after entry of their requested dismissal." *Id.*

The district court granted the dismissal with prejudice, "reserving to all parties their arguments as to the propriety of any appeal." Pet. App. 36a-37a.

6. The Ninth Circuit assumed jurisdiction over respondents' appeal and reversed. Relying on its holding several months earlier in *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061 (9th Cir. 2014), the court of appeals held that "in the absence of a settlement, a stipulation that leads to a dismissal with prejudice does not destroy the adversity in that judgment necessary to support an appeal" of a class-certification denial. Pet. App. 12a (quoting *Berger*,

741 F.3d at 1064). Microsoft argued at length that *Berger* cannot be squared with this Court's holding in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), and that plaintiffs may not manufacture an immediate appeal by dismissing and thereby showing that a class-certification denial has in fact sounded the "death knell" of their claims. Def. CA9 Br. 4-16. But the Ninth Circuit responded simply that *Berger* controlled, refusing to question that prior holding. Pet. App. 11a-12a.

Turning to the class-certification denial itself, the Ninth Circuit held that the district court "abused its discretion when it struck the class action allegations." Pet. App. 19a. Relying on *Wolin*, the Ninth Circuit held that Rule 23 allows classes to be certified when plaintiffs characterize their claims as turning on "a common factual question—is there a defect?" and on whether that defect breaches a warranty. *Id.* 16a. It does not necessarily make any difference whether "the defect here may never manifest" or if it manifests for different users for different reasons. *Id.* 17a.

At the same time, the Ninth Circuit acknowledged that "Microsoft makes several arguments" besides the one adopted by the district court "to show that certification of this class would violate Federal Rule of Civil Procedure 23." Pet. App. 18a. The Ninth Circuit stressed, therefore, that it was "express[ing] no opinion on whether the specific common issues identified in this case are amenable to adjudication by way of a class action, or whether plaintiffs should prevail on a motion for class certification." *Id.* 19a. Instead, it "suffice[d] for now to hold that . . . the district court misread *Wolin*" and

to remand for further proceedings concerning the viability of respondents' proposed class. *Id.* 18a, 19a.

7. Microsoft sought rehearing en banc. It argued that the Ninth Circuit's rule allowing plaintiffs to create appellate jurisdiction over class-certification denials by voluntarily dismissing their claims not only contravenes this Court's holding in *Livesay* but also conflicts with the law in a majority of the circuits to consider the issue. The court of appeals denied the petition without any judge requesting a vote. Pet. App. 5a.

8. This petition follows.

REASONS FOR GRANTING THE WRIT

In *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), this Court held unanimously that plaintiffs may not force an appellate court to hear an interlocutory appeal from an order denying class certification. This is so, this Court explained, even if the plaintiffs demonstrate that the denial of class certification is the "death knell" of their case—that is, even if the denial effectively ends the litigation because it makes it "economically imprudent [for the plaintiffs] to pursue [the] lawsuit to a final judgment and then seek appellate review of [the] adverse class determination." *Id.* at 469-70.

Since *Livesay*, the courts of appeals have split five-to-two over whether plaintiffs faced with adverse class determinations may evade *Livesay*'s prohibition against mandatory interlocutory appellate review by voluntarily dismissing their claims, thereby purportedly creating an adverse final judgment.

This Court should grant certiorari here to resolve this conflict. The question is immensely important to

the proper administration of the class-action device. Further, this case is a particularly suitable vehicle for considering the question. It showcases the reasons why the voluntary dismissal tactic evades the carefully crafted rules governing appellate jurisdiction in class actions. Finally, the Ninth Circuit's holding that plaintiffs may create appellate jurisdiction through the voluntary dismissal tactic is wrong. The tactic is nothing more than the "death knell" doctrine dressed up in different garb—and it likewise circumvents the prerequisites for appeals contained in 28 U.S.C. § 1291 and Article III.

I. The Federal Courts Of Appeals Are Divided Over Whether Plaintiffs May Appeal An Order Denying Class Certification After Voluntarily Dismissing Their Claims With Prejudice.

As treatises and practice guides recognize, "[c]ourts disagree" on whether plaintiffs seeking to represent a class "may appeal from a judgment entered after a voluntary dismissal with prejudice." HON. A. WALLACE TASHIMA & JAMES M. WAGSTAFFE, FEDERAL CIVIL PROCEDURE BEFORE TRIAL § 16:396 (2015); *see also* THOMAS SMITH & ELIZABETH WILLIAMS, 6 CYCLOPEDIA OF FEDERAL PROCEDURE § 23.46 (3d ed. 2015) (explaining that while some courts allow such appeals of decertification orders, "other courts consider this result untenable, because it allows the putative class representative to evade the policy against piecemeal review by waiving his or her individual claims"). Over half of the circuits have weighed in as follows:

1. Five circuits have held that a court of appeals lacks jurisdiction to review a denial of class

certification where the plaintiffs have voluntarily dismissed their claims with prejudice.

Not long after this Court issued its opinion in *Livesay*, the Tenth Circuit considered whether it had jurisdiction to review a denial of class certification where the plaintiff employed "the simple device of allowing the claim of [the] class representative to be dismissed for lack of prosecution." *Bowe v. First of Denver Mortg. Investors*, 613 F.2d 798, 801 (10th Cir. 1980). The Tenth Circuit held the situation was "governed by the Supreme Court's decision in *Livesay*." *Id.* at 800. The fact that "[t]he 'death knell' has indeed sounded"—as opposed to being merely foretold—does not create a "genuine distinction" from *Livesay* allowing jurisdiction. *Id.* at 800, 802.

The Third, Fourth, and Seventh Circuits have since adopted the same view. Reviewing a case in which the plaintiffs "voluntarily dismiss[ed] all of their claims" "to manufacture finality," the Third Circuit held that such a "procedural sleight-of-hand" does not create appellate jurisdiction. *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 245-47 (3d Cir. 2013). The Fourth Circuit likewise has held that "when a putative class plaintiff voluntarily dismisses the individual claims underlying a request for class certification," a court of appeals "lack[s] jurisdiction to decide the issue whether the district court abused its discretion in denying the plaintiff['s] request for class certification." *Rhodes v. E.I. DuPont de Nemours & Co.*, 636 F.3d 88, 100 (4th Cir.), *cert. denied*, 132 S. Ct. 499 (2011); *see also Himler v. Comprehensive Care Corp.*, 993 F.2d 1537 (4th Cir. 1993) (unpublished opinion) (same). And the Seventh Circuit has held that it "will . . . not review the

district court's refusal to certify a class" when "the plaintiffs requested and were granted a voluntary dismissal of their [] claims." *Chavez v. Illinois State Police*, 251 F.3d 612, 629 (7th Cir. 2001); *see also id.* at 621, 627 (recounting detailed procedural history of case).

The Eleventh Circuit has gone even further, holding that it has "no jurisdiction" whenever a plaintiff "appeal[s] from a final judgment that resulted from a voluntary dismissal with prejudice." *Druhan v. Am. Mut. Life*, 166 F.3d 1324, 1325-26 (11th Cir. 1999). It does not matter whether "[t]he dismissal with prejudice was requested only as a means of establishing finality in the case such that the plaintiff could appeal [an] interlocutory order—an order that the plaintiff believes effectively disposed of her case." *Id.* at 1326. Nor does it matter whether the interlocutory order did, in fact, "eliminate[] the plaintiff's claim." *Id.* at 1327 n.7. In either case, neither 28 U.S.C. § 1291 nor Article III permits the appeal. *Id.* at 1326-27. *Druhan* was not a class action, but courts have since confirmed that its categorical holding applies equally to class actions. *See Woodard v. STP Corp.*, 170 F.3d 1043, 1044 (11th Cir. 1999); *Kay v. Online Vacation Ctr. Holdings Corp.*, 539 F. Supp. 2d 1372, 1373-75 (S.D. Fla. 2008).

2. In direct contrast to these holdings, two circuits now hold that a named plaintiff's "voluntary dismissal with prejudice" creates "'a sufficiently adverse—and thus appealable—final decision'" for the plaintiff to obtain review of a class-certification denial. Pet. App. 12a (quoting *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1065 (9th Cir. 2014)). Rejecting Microsoft's argument that this rule "flouts"

Livesay by "forc[ing] appellate jurisdiction whenever a plaintiff's counsel declares a death knell," Def. CA9 Br. 9; *see also id.* at 4-16, the Ninth Circuit pronounced here that, absent a settlement, a plaintiff's "stipulation that leads to a dismissal with prejudice does not destroy the adversity in that judgment necessary to support an appeal." Pet. App. 12a (quoting *Berger*, 741 F.3d at 1064).[2]

The Second Circuit similarly has held that named plaintiffs may secure appellate review of class-certification denials by precipitating entry of dismissals for failure to prosecute. *See Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 178-79 (2d Cir. 1990), *cert. denied*, 498 U.S. 1025 (1991).[3] The Second Circuit

---

[2] The Ninth Circuit distinguished this scenario from *Huey v. Teledyne, Inc.*, 608 F.2d 1234 (9th Cir. 1979), in which it held that a dismissal for failure to prosecute does not create appellate jurisdiction to review the denial of class certification. Some other circuits (understandably) had read *Huey* to apply when named plaintiffs voluntarily stopped pursuing a case to manufacture an appeal. *See, e.g., Bowe*, 613 F.2d at 801. But the Ninth Circuit clarified here that *Huey* applies only when the dismissal was necessary to preserve district courts' ability "'to achieve the orderly and expeditious disposition of cases,'" Pet. App. 12a n.4 (quoting *Huey*, 608 F.2d at 1239)—that is, when dismissal was occasioned not just by a desire to manufacture an appeal but also by plaintiffs' "dilatory" tactics, *Huey*, 608 F.2d at 1240; *see also Hutchins v. A.G. Edwards & Sons, Inc.*, 116 F.3d 1256, 1260 (8th Cir. 1997) (same rule). The plaintiffs here were not dilatory, nor did the plaintiffs act in a dilatory manner in any of the cases cited above in the conflict.

[3] The plaintiff sought certiorari to challenge the Second Circuit's affirmance of the district court's refusal to certify the class. The petition did not raise the question presented here.

deems *Livesay* "inapplicable" in this situation on the ground that "immediate appellate review will only be available to disappointed class representatives who risk forfeiting their potentially meritorious individual claims." *Id.* at 179; *see also Palmieri v. Defaria*, 88 F.3d 136, 141 (2d Cir. 1996) (appellate review available in this situation because the denial of class certification "as a practical matter stop[s] the plaintiff's action altogether"). While sitting on the Second Circuit, then-Judge Sotomayor acknowledged that the Second Circuit's holding condoning the voluntary dismissal tactic "has been rejected by other circuits," and she suggested the rule might be infirm. *Shannon v. General Elec. Co.*, 186 F.3d 186, 193 (2d Cir. 1999). But the rule remains the law in that circuit.

3. This circuit split is now firmly entrenched. The Ninth Circuit refused to rehear this case en banc, Pet. App. 5a, perhaps taking solace in the fact that its view is seemingly endorsed by "[a] leading procedural treatise," *Berger*, 741 F.3d at 1065 (citing 7B CHARLES ALAN WRIGHT, ARTHUR MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1802, at 297-98 (3d ed. 2005)); *accord* Pet. App. 12a n.4. (The treatise cites only Second Circuit precedent; it does not mention the conflicting case law.) On the other hand, none of the circuits faithfully applying *Livesay* and Article III in this context have any reason to revisit their views—nor is there any realistic prospect that *all five* might do so. Only this Court can bring uniformity to this jurisdictional issue.

II. The Question Presented Is Exceptionally Important.

For the same reasons this Court in *Livesay* deemed the legitimacy of the "death knell" doctrine worthy of this Court's attention, the propriety of the voluntary dismissal tactic demands this Court's review.

1. "Restricting appellate review to 'final decisions' prevents the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, at practical consequence, but a single controversy." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974). Just as the "death knell" doctrine in *Livesay* threatened to upset this "vital" balance between trial and appellate courts, 437 U.S. at 476, the voluntary dismissal tactic is guaranteed to generate piecemeal appellate review. One need look no further than this case to appreciate the point. As the Ninth Circuit noted, "Microsoft makes several arguments to show that certification of this class would violate Federal Rule of Civil Procedure 23." Pet. App. 18a.[4] But the Ninth Circuit considered only one of those arguments, ultimately "express[ing] no opinion on whether the specific common issues

---

[4] To take but one example, the Xbox warranty promised the console would "substantially conform to the printed user instruction materials," and those materials warned users not to move or tilt the console with a disc in the drive "[t]o avoid jamming the disc drive and damaging discs." CA9 ER 106, 273, 278. Individual proof is therefore necessary to determine any breach of warranty as to any particular console owner, especially given undisputed evidence showing only 0.4% reported scratched discs.

identified in this case are amenable to adjudication by way of a class action, or whether plaintiffs should prevail on a motion for class certification." *Id.* 19a.

As a result, if the district court denies class certification on remand, respondents may voluntarily dismiss again and force another appeal. If the Ninth Circuit reverses again, that process could repeat itself. And it could continue to repeat indefinitely. This potentially endless cycle enshrines piecemeal appeals as a litigation threat in proposed class actions.

2. The Ninth Circuit's voluntary dismissal rule gives plaintiffs an unfair advantage in class actions. Just as plaintiffs worry that a denial of class certification will sound the death knell for their case, "the class issue—whether to certify, and if so, how large the class should be—will often be of critical importance to defendants as well. Certification of a large class may so increase a defendant's potential damages liability and litigation costs that [the defendant] may find it economically prudent to settle and to abandon a meritorious defense." *Livesay*, 437 U.S. at 476; *see also AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (noting "the risk of 'in terrorem' settlements that class actions entail" because, "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims"). Yet just like the "death knell" doctrine this Court rejected in *Livesay*, the voluntary dismissal tactic "operates only in favor of plaintiffs." 437 U.S. at 476. This one-way ratchet distorts litigation and settlement incentives in these high-stakes cases.

3. The increasing prevalence of nationwide class actions—and the particular attractiveness of the voluntary dismissal tactic in such cases—deepens the need for prompt review. As our economy has become less segmented and more national in scale, plaintiffs have increasingly sought to certify nationwide classes. The proposed nationwide class here, for example, may exceed 10 million people. Other examples abound of classes having a similar size and nationwide reach, especially in consumer cases with minimal per-person damages. *See, e.g., In re The NVIDIA GPU Litig.*, 539 F. App'x 822, 824 (9th Cir. 2013) (class of "about 5 million consumers" of computers); *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 26 (2d Cir. 2003) (Newman, J. concurring) (proposed class of 12 million consumers); *Ewert v. Ebay, Inc.*, No. 07-CV-2198, 2010 WL 4269259, *3, *13 (N.D. Cal. Oct. 25, 2010) (certifying class of "over one million" sellers on website); *see also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2547-48 (2011) (proposed class of 1.5 million employees).

Cases of this nature, with potential plaintiffs residing across the country, are ripe for forum shopping. Plaintiffs in many of these cases may file in any jurisdiction they like—as illustrated by the seven cases that began this saga, in jurisdictions ranging from Washington to Florida. That being so, the need for uniform rules for litigating class-certification issues is manifest. Yet now that the Ninth Circuit has broken from other circuits and condoned the voluntary dismissal tactic, plaintiffs in class-action cases have wasted no time incorporating

the tactic into their procedural toolboxes for cases there.[5]

III. This Case Is A Particularly Suitable Vehicle For Resolving The Question Presented.

For two reasons, this case presents an excellent vehicle for resolving the propriety of the voluntary dismissal tactic.

1. This case puts into stark view the abuse that the voluntary dismissal tactic threatens. Years after *Livesay*, the Rules Committee gave the courts of appeals the authority, under Fed. R. Civ. P. 23(f), to hear interlocutory appeals of orders denying class certification. Courts of appeals have "unfettered discretion" to determine when to accept such interlocutory review. *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 957 (9th Cir. 2005). But one of the factors the courts of appeals typically consider is "whe[ther], as a practical matter, the decision on certification is likely dispositive of the litigation." Fed. R. Civ. P. 23 advisory committee's note to 1998 Amendment. If the court of appeals believes it is looking at a genuine "death [] knell situation," it may allow the appeal for that reason alone. *Chamberlan*,

---

[5] *See, e.g., Bobbitt v. Milberg LLP*, ___ F.3d ___, 2015 WL 5255081, *1-2 (Sept. 10, 2015) (applying this case to find jurisdiction over appeal after plaintiffs' "voluntary dismissal of their individual claims"); Appellant Henson's Reply Br. at 1, *Henson v. Fid. Nat'l Fin., Inc.*, No. 14-56578 (9th Cir.), *available at* 2015 WL 4537372 (invoking this case to support jurisdiction after voluntary dismissal); Reply Brief of Plaintiff-Appellant, *Smith v. Microsoft Corp.*, No. 14-55807 (9th Cir. Mar. 30, 2015), ECF 25 at 28-33.

402 F.3d at 957. But courts of appeals always remain free to reject plaintiffs' Rule 23(f) petitions for any reason.

As this case illustrates, the Ninth Circuit's acceptance of the voluntary dismissal tactic allows plaintiffs who try, and fail, to obtain discretionary review under Rule 23(f) to *force* courts to accept review anyway. Respondents sought interlocutory review under Rule 23(f), arguing "The District Court's Order Creates a Death-Knell Situation for Plaintiffs." Pet. for Permission to Appeal Under Fed. R. Civ. P. 23(f) at 17. Their predecessors in the original Xbox suit did likewise. *See supra* at 3-4. The Ninth Circuit denied both petitions. Yet respondents countered by voluntarily dismissing their claims—thereby, under Ninth Circuit law, *requiring* the court of appeals to hear the very appeal it denied twice.

This makes a mockery of the discretion and balance Rule 23(f) confers. When that rule was promulgated, the Advisory Committee, drawing support from a Federal Judicial Center study, noted that "many suits with class action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings." Fed. R. Civ. P. 23 advisory committee's note to 1998 amendment. For that reason and others, the courts of appeals deny plaintiffs' Rule 23(f) petitions about eighty percent of

the time.[6] Yet under the Ninth Circuit's voluntary dismissal rule, plaintiffs can require courts of appeals to hear *all* of these appeals. This cannot be right.

2. The jurisdictional issue is outcome-determinative here. Denials of class certification are reviewed for abuse of discretion. *See, e.g., Stearns v. Ticketmaster, Inc.*, 655 F.3d 1013, 1018 (9th Cir. 2011). Therefore, even when a court of appeals improperly assumes jurisdiction over an appeal challenging the denial of class certification, the court will often affirm, as the Ninth Circuit did in *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1070-71 (9th Cir. 2014). Such affirmances would be unlikely vehicles for addressing the propriety of the voluntary dismissal tactic, for a defendant in that situation would have no basis to seek review of a case in which it has prevailed, and plaintiffs would not seek review of a jurisdictional issue decided in their favor.

By contrast, both Microsoft and respondents have real interests in play here. The fact that the Ninth Circuit reversed the district court's denial of certification means that, if plaintiffs' voluntary dismissal gambit is allowed to stand, Microsoft faces years of continued litigation and uncertainty. Reversing the Ninth Circuit's decision, on the other hand, would require dismissal of respondents' appeal, thereby allowing the district court's final judgment for Microsoft to take effect.

---

[6] John Beisner et al., *Study Reveals US Courts of Appeals Are Less Receptive to Reviewing Class Certification Rulings*, http://www.skadden.com/newsletters/OUTCOMES_TABLE.pdf.

IV. The Ninth Circuit's Decision Is Wrong.

The voluntary dismissal tactic that the Ninth and Second Circuits condone flies in the face of settled jurisdictional principles.

1. This Court held in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), that plaintiffs may not create appellate jurisdiction over orders denying class certification by maintaining that the orders sound the "death knells" of their lawsuits. It makes no difference whether the plaintiffs, in fact, "will not pursue their individual claim[s] if the decertification order stands." *Id.* at 466 n.7; *see also id.* at 470 (accepting that "refusal to certify a class" may sometimes "induce a plaintiff to abandon his individual claim"). Writing for a unanimous Court, Justice Stevens explained that the cost of avoiding mandatory appellate jurisdiction in this situation is "outweighed" by the impact such jurisdiction would have "on the judicial system's overall capacity to administer justice." *Id.* at 473. Accordingly, "the *only sure path* to appellate review" for plaintiffs refused class certification "is by proceeding to final judgment on the merits of [their] individual claim[s]," and, if they succeed, appealing the denial of class certification. Fed. R. Civ. P. 23 advisory committee's note to1998 Amendment (emphasis added).

The voluntary dismissal tactic cannot be squared with *Livesay*. The reason named plaintiffs voluntarily dismiss their individual cases after being denied class certification is to obtain immediate appellate review of orders they view as death knells. (Indeed, respondents explained here that they dismissed their claims because they viewed the district court's refusal to certify a class as the "death

knell" of their case. Pet. for Permission to Appeal Under Fed. R. Civ. P. 23(f) at 17. They wanted immediately "to appeal the [order] striking Plaintiff's class allegations." Pet. App. 36a.) And the Second and Ninth Circuits allow such appeals because the denials of class certifications "as a practical matter stop[] the plaintiff's action altogether." *Palmieri v. Defaria*, 88 F.3d 136, 141 (2d Cir. 1996) (explaining basis for the holding in *Gary Plastic*); *see also Gary Plastic*, 903 F.2d at 180 (noting that plaintiff "conceded that it does not intend to pursue its individual claims").

This reasoning simply resuscitates the death knell doctrine *Livesay* rejected. In fact, insofar as plaintiffs who voluntarily dismiss their claims may revive those claims on remand from reversal of an order denying class certification, the voluntary dismissal tactic functions *exactly the same* as the death knell doctrine did.

To be sure, plaintiffs under a voluntary dismissal regime must offer "a graphic demonstration"—by way of a formal motion to dismiss—"that the 'death knell' has indeed sounded." *Bowe*, 613 F.2d at 800. But that does not distinguish the voluntary dismissal tactic from the death knell doctrine. The very foundation of the death knell doctrine was a requirement that plaintiffs prove that "they would not pursue their claims individually." *Livesay*, 437 U.S. at 466. Confirming that reality in a separate filing is nothing more than meaningless formalism.

Lest there be any doubt that the voluntary dismissal tactic and the death knell doctrine are effectively one and the same, the voluntary dismissal tactic presents the same practical problems as well.

First, like the death knell doctrine, the voluntary dismissal tactic creates a "serious" "potential for multiple appeals in every complex case," *Livesay*, 437 U.S. at 474. *See supra* at 16-17. Second, like the death knell doctrine, the voluntary dismissal tactic "operates only in favor of plaintiffs even though the class issue—whether to certify, and if so, how large the class should be—will often be of critical importance to defendants as well," *Livesay*, 437 U.S. at 476. *See supra* at 14.

Third, and perhaps most significant, the voluntary dismissal tactic "circumvents" restrictions that federal law imposes upon "interlocutory review of decisions made by the trial judge," *id.* at 474-75. The death knell doctrine evaded the restrictions on interlocutory review embodied in 28 U.S.C. § 1292(b), which require parties seeking immediate appellate review to persuade the trial and appellate courts, in their discretion, to allow an appeal. *See Livesay*, 437 U.S. at 474-75. Rule 23(f) has now replaced Section 1292(b) with respect to class-certification orders, requiring plaintiffs to persuade only appellate courts (and not district courts) to allow interlocutory review of class-certification denials. But as this case vividly illustrates, the voluntary dismissal tactic circumvents this Rule in precisely the same way the death knell doctrine sidestepped Section 1292(b). It thus cannot be tolerated.

2. The only other conceivable argument a plaintiff might make to differentiate the voluntary dismissal tactic from the death knell doctrine would be to contend that voluntarily dismissing one's claims amounts to an irrevocable abandonment of the case, preventing the plaintiff's individual claims from

springing back to life even if a court of appeals reverses the denial of class certification. But any plaintiff who might make such an argument to evade *Livesay* would have yet another problem: Article III requires the named plaintiff in a class action to have a "personal stake" in the litigation. *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980). "If an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990)) (additional internal quotation marks omitted in original). Thus, as the Fourth Circuit has explained, "when a putative class plaintiff voluntarily dismisses the individual claims underlying a request for class certification, . . . there is no longer a 'self-interested party advocating' for class treatment in a manner necessary to satisfy Article III requirements." *Rhodes*, 636 F.3d at 100 (quoting *Geraghty*, 445 U.S. at 403); *see also Bd. of Sch. Comm'rs v. Jacobs*, 420 U.S. 128, 129-30 (1975) (per curiam) (case became moot when named plaintiffs seeking injunctive relief became ineligible for such relief before class certification).

In short, no matter how one approaches the voluntary dismissal tactic, it runs headlong into settled restrictions on appellate jurisdiction and the power of federal courts. This Court should grant review and repudiate the ploy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Bradford L. Smith
David M. Howard
Timothy G. Fielden
Microsoft Corporation
One Microsoft Way
Redmond, WA 98052

Charles B. Casper
Montgomery, McCracken
Walker & Rhoads, LLP
123 South Broad Street
Philadelphia, PA 19109

Stephen M. Rummage
Counsel of Record
Fred B. Burnside
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 220
Seattle, WA 98101
(206) 622-3150
steverummage@dwt.com

Jeffrey L. Fisher
559 Nathan Abbott Way
Stanford, CA 94305

October 2015

APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12-35946

D.C. No. 2:11-cv-00722 RSM

SETH BAKER; MATTHEW DANZIG; JAMES JARRETT; NATHAN MARLOW; MARK RISK, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

MICROSOFT CORPORATION, a Washington Corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Washington
Ricardo S. Martinez, District Judge, Presiding

Argued and Submitted
April 7, 2014— Seattle, Washington

Filed March 18, 2015
Amended July 20, 2015

Before: Michael Daly Hawkins, Johnnie B. Rawlinson, and Carlos T. Bea, Circuit Judges.

Order;
Opinion by Judge Rawlinson;
Concurrence by Judge Bea

ORDER AND AMENDED OPINION

SUMMARY*

Class Certification

The panel reversed the district court's stipulated dismissal and order striking class allegations in a diversity action brought by a putative class of owners of Microsoft Corporation's Xbox 360 video game console.

The putative class alleged a design defect in the Xbox console that gouged game discs. In striking the class allegations, the district court concluded that comity required deferral to an earlier class certification denial from another district court decision involving a similar putative class.

The panel held that there was jurisdiction under 28 U.S.C. § 1291 to hear the appeal because the district court's dismissal of the action with prejudice was a sufficiently adverse, and appealable, final decision, even though the dismissal was the product of a stipulation. The panel also held that the decision in *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d

---

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

1168, 1173 (9th Cir. 2010) (rejecting the notion that individual manifestations of a defect precluded resolution of the claims on a class-wide basis), was controlling, and the district court's decision striking the class action allegations from the complaint contravened *Wolin* and was an abuse of discretion. The panel remanded for further proceedings.

Judge Bea concurred in the result, but not the reasoning, of the majority opinion. Judge Bea would hold that under the principles of comity a federal district court faced with an earlier denial of class certification in an earlier common dispute heard in a different district court should adopt a rebuttable presumption of correctness; and Judge Bea would conclude that presumption was rebutted in this case.

COUNSEL

Benjamin Gould (argued), Mark A. Griffin, and Amy C. Williams-Derry, Keller Rohrback LLP, Seattle, Washington; Paul L. Stritmatter, Stritmatter Kessler Whelan Coluccio, Hoquiam, Washington; Brad J. Moore, Stritmatter Kessler Whelan Coluccio, Seattle, Washington; Robert L. Esensten, Wasserman, Comden, Casselman & Esensten, LLP, Tarzana, California; Darren T. Kaplan, Darren Kaplan Law Firm, P.C., New York, New York; Gregory E. Keller, Chitwood Harley Harnes LLP, Atlanta, Georgia; and Jeffrey M. Ostrow, Kopelowitz Ostrow Ferguson Weiselberg Keechl, Fort Lauderdale, Florida, for Plaintiffs-Appellants.

Stephen M. Rummage (argued), Frederick B. Burnside, and John Goldmark, Davis Wright Tremaine LLP, Seattle, Washington, for Defendant-Appellee.

ORDER

The slip opinion dated March 18, 2015 is hereby amended as follows:

Page 11 - insert the following footnote at the end of the first paragraph:

> Our decision in *Huey v. Teledyne, Inc.*, 608 F.2d 1234 (9th Cir. 1979), is not to the contrary. There, putative class plaintiff Huey's motion for class certification was denied in the district court. *Id.* at 1236. Subsequently, Huey's individual action was called for trial, but Huey made no appearance; accordingly, the district court dismissed Huey's action for want of prosecution. *Id.* Huey attempted to appeal the denial of class certification, but this court explained that it lacked jurisdiction over the appeal. We explained that the strong policy of giving trial judges the ability "to achieve the orderly and expeditious disposition of cases" meant that plaintiffs who had failed to prosecute their claims lost the ability to appeal the denial of class certification. *Id.* at 1239 (quoting *Sullivan v. Pacific Indem. Co.*, 566 F.2d 444, 445–46 (3rd Cir. 1977)).
>
> However, *Huey* does not control here. Unlike that proceeding, Baker did not fail to appear before the district court after the class action allegations were struck. In fact, Baker stipulated to dismiss his individual claim, giving up a valuable right in the process. Our cases recognize that a stipulated dismissal of an individual claim is an adverse and appealable final judgment, *Berger*, 741 F.3d

at 1065, as does a leading treatise. *See* 7B Charles Allan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice & Procedure § 1802 (3d ed. 2005).

With this amendment, Judges Rawlinson and Bea voted, and Judge Hawkins recommended, to deny the Petition for En Banc Rehearing.

The full court has been advised of the Petition for En Banc Rehearing, and no judge of the court has requested a vote.

Microsoft Corporation's Petition for En Banc Rehearing, filed on April 1, 2015, is DENIED. No further petitions for rehearing or rehearing en banc will be accepted.

OPINION

RAWLINSON, Circuit Judge:

Plaintiffs, a putative class of owners of Microsoft Corporation's (Microsoft) Xbox 360® video game console (Xbox), appeal from the stipulated dismissal with prejudice of their lawsuit and from the order striking their class allegations. In striking the class allegations, the district court deferred to an earlier class certification denial order involving a similar putative class. *See Baker v. Microsoft Corp.*, 851 F. Supp.2d 1274, 1276 (W.D. Wash. 2012) (citing *In re Microsoft Xbox 360 Scratched Disc Litig.*, No. C07-1121, 2009 WL 10219350 (W.D. Wash. Oct. 5, 2009) (*Scratched Disc Litigation*)). We have jurisdiction pursuant to 28 U.S.C. § 1291 and reverse the order striking the class action allegations because the district court misapplied the law as established in *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d

1168, 1173 (9th Cir. 2010), constituting an abuse of discretion.

I. BACKGROUND

This case involves an alleged design defect in the Xbox console that gouges game discs. *See Baker*, 851 F. Supp.2d at 1275. Plaintiffs specifically alleged that the Xbox optical disc drive is unable to withstand even the smallest of vibrations, and that during normal game playing conditions discs spin out of control and crash into internal console components, resulting in scratched discs that are rendered permanently unplayable. Microsoft countered that the overwhelming majority of Xboxes do not manifest the alleged defect—only 0.4% of Xbox owners have reported disc scratching—and that the cause of any disc scratching is consumer misuse, not a product defect.

A. SCRATCHED DISC LITIGATION

In 2007, other Xbox owners sued Microsoft, alleging claims similar to those asserted in this case. These cases were consolidated before United States District Judge John Coughenour. *See Scratched Disc Litig.*, 2009 WL 10219350, at *1–*2. Judge Coughenour denied class certification on the basis that individual issues of fact and law predominated over common issues of fact and law. *See id.* at *5–*6.

Judge Coughenour relied heavily on the reasoning from another district court decision, *Gable v. LandRover N. Am., Inc.*, No. CV07-0376, 2008 WL 4441960 (C.D. Cal. Sept. 29, 2008), *rev'd, Wolin*, 617 F.3d at 1176. *See Scratched Disc Litig.*, 2009 WL 10219350, at *6. The putative class action plaintiffs in *Gable* alleged that the Land Rover LR3 had a defect in

its alignment that caused uneven, premature tire wear. *See Gable*, 2008 WL 4441960, at *1.[1] In opposing class certification, defendant Land Rover argued that because the alleged defect did not manifest in every vehicle, an individual inquiry would be required to ascertain whether any given class member experienced the defect. *See id.* at *3. Land Rover also asserted that because tires have a limited useful life, an individual inquiry would be required to determine whether any given tire wear resulted from a defect and not another cause, such as individual driving habits. *See id.* The district court agreed with Land Rover, and denied class certification because the plaintiffs failed to demonstrate that the purported defect manifested in a majority of vehicles. *See id.* at *4–*5. The district court did not address Land Rover's causation argument.

In *Scratched Disc Litigation*, Judge Coughenour reasoned that, like the Land Rover owners in *Gable*, most Xbox owners have not experienced the purported defect. *See Scratched Disc Litig.*, 2009 WL 10219350, at *7. Judge Coughenour focused on the fact that the defect asserted by the Xbox plaintiffs "actually manifest[ed] in fewer than one percent" of the total number of consoles purchased. *Id.* at *6. The vast number of satisfied purchasers who experienced no defect before replacing the rapidly obsolescing game systems were determined to have received the benefit of the bargain. *See id.* Because not all purchasers sustained damages under this rationale, Judge Coughenour ruled that the need to consider damages

---

[1] In particular, the plaintiffs contended that the front of each of the vehicle's rear tires was farther out from the center line than the back of each tire, a condition the district court described as "duck-footed." *Gable*, 2008 WL 4441960, at *1.

on an individual basis "preclude[d] the certification" of the class of Xbox owners. *Id.*

Judge Coughenour rejected the Xbox plaintiffs' attempt to distinguish *Gable* on the basis that the design defect existed in every Xbox console and could only stem from one cause, whereas in *Gable* "only a fraction of the proposed class members had actually experienced the defect and because misalignment could have many different causes." *Id.* Judge Coughenour observed that the Xbox plaintiffs and the Gable plaintiffs both asserted a defect involving a common design flaw. The circumstance that prevented class certification in both cases was the lack of uniform manifestation of the acknowledged design flaw. *See id.*

Although the district court in *Gable* refrained from engaging in an exhaustive causation analysis, Judge Coughenour nevertheless cited *Gable* for the notion that individual issues of causation predominate because differing causes may have produced the same defect. *See id.* According to Judge Coughenour, "[E]ven if one link of [the causation] chain is a design defect, the other links are unique to each plaintiff and require individual attention. . . ." *Id.* The required individual attention to issues of law and fact ruled out class certification. *See id.*

B. WOLIN DECISION

Ten months after dismissal of *Scratched Disc Litigation*, we reversed the Gable decision upon which Judge Coughenour had so heavily relied in denying class certification. *See Wolin*, 617 F.3d at 1170, 1176. We concluded that the district court in *Gable* "erred when it concluded, without discussion, that certification is inappropriate because [plaintiffs] did not prove that the defect manifested in a majority of the class's

vehicles. . . ." *Id.* at 1173. Indeed, in the past, "we have held that proof of the manifestation of a defect is not a prerequisite to class certification." *Id.* (citing *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975)). We observed that rather than challenging the predominance of common legal and factual issues, Land Rover was actually arguing the merits of the case. *See id.* We concluded that while "individual factors may affect premature tire wear, they do not affect whether the vehicles were sold with an alignment defect." *Id.*

> [W]e reject[ed] Land Rover's suggestion that automobile defect cases can categorically never be certified as a class. Gable and Wolin assert[ed] that the defect exists in the alignment geometry, not in the tires, that Land Rover failed to reveal material facts in violation of consumer protection laws, and that Land Rover was unjustly enriched when it sold a defective vehicle. All of these allegations are susceptible to proof by generalized evidence.

Id.

Land Rover also asserted that the claims of plaintiffs Gable and Wolin were not typical because the wear on their tires was not attributable to misalignment. *See id.* at 1175. We were not persuaded to this view because Land Rover failed to identify any defenses that were unique to Gable and Wolin. *See id.* We decided that regardless of when the premature tire wear was experienced, the fact remained that all class members at some point experienced the same injury due to the same defect. The timing of the defect affected the amount of damages, not the appropriateness of class certification. *See id.* In sum, we held that the requirement of typicality "can be satisfied despite

different factual circumstances surrounding the manifestation of the defect." *Id.* (citation omitted). We concluded that Gable, Wolin, and the other class members could have a viable claim against Land Rover regardless of how the defect manifested in the individual vehicles. See id. We ruled that the asserted alignment defect, the asserted violation of warranty, and the asserted unjust enrichment due to the lessened value of the vehicles were "issues common to all class members . . ." *Id.* at 1176.

The district court in this case determined that our ruling in *Wolin* did not undermine the causation analysis articulated in *Scratched Disc Litigation*, and that comity required deferral to the earlier certification order. *See Baker*, 851 F. Supp.2d at 1279–81 (striking the class action allegations from the complaint). The district court noted that no Ninth Circuit or Supreme Court precedent articulated the mechanism by which comity was to operate; thus it adopted the suggestion of the American Law Institute (ALI) that a prior denial of class certification on the same subject matter by a different district court judge be given a rebuttable presumption of correctness. *See id.* at 1278. The district court then determined that the presumption had not been rebutted, and deferred to Judge Coughenour's prior decision. *See id.* at 1280.

Plaintiffs initially petitioned for an interlocutory appeal, which was denied. The parties subsequently stipulated to dismiss the case with prejudice, and the district court approved the stipulation. Plaintiffs timely appealed.[2]

---

[2] Courts have grappled with the balance between preventing repeated frivolous efforts to certify a class and preserving due process rights. *See, e.g., In re Bridgestone/Firestone, Inc., Tires*

II. DISCUSSION

A. JURISDICTION

Microsoft contends that we lack jurisdiction to consider this appeal because the voluntary dismissal with prejudice did not create appellate jurisdiction. Because jurisdiction is a threshold issue, we resolve this matter before addressing the merits. *See Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011).

Microsoft takes the position that a voluntary dismissal with prejudice does not sufficiently affect the merits of the substantive claims to constitute an appealable final judgment.[3] However, we rejected a similar argument in *Berger*, where as in this case, the parties stipulated to dismissal of the case with prejudice following denial of a class certification motion. 741 F.3d at 1064. Like Microsoft, the defendant in Berger challenged our jurisdiction over an appeal resulting from stipulated dismissal of a

---

Products Liab. Litig., 333 F.3d 763, 768–69 (7th Cir. 2003) (binding putative class members whether or not named). Despite the Supreme Court's recognition of "policy concerns relating to use of the class action device," the Court rejected the Seventh Circuit's approach and decided that "principles of *stare decisis* and comity among courts" would have to "mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs." *Smith v. Bayer Corp.*, 131 S.Ct. 2368, 2381 (2011). The district court's application of the ALI proposal may be viewed as an effort to reconcile these values and follow the Supreme Court's guidance in *Smith*.

[3] Microsoft also contends that because the Plaintiffs unsuccessfully moved for interlocutory appeal under Rule 23(f), they must litigate the merits of their claims to final judgment to obtain appellate review. However, Microsoft has not presented a principled basis for this proposed distinction between the present case and *Berger*.

putative class action. *See id.* at 1065. We disagreed, ruling that "in the absence of a settlement, a stipulation that leads to a dismissal with prejudice does not destroy the adversity in that judgment necessary to support an appeal. . . ." *Id.* at 1064. We distinguished a stipulated dismissal without a settlement from a stipulated dismissal with a settlement. The former retains sufficient adversity to sustain an appeal. The latter does not. *See id.* at 1065.

As this case did not involve a settlement, *Berger* establishes that "[w]e have jurisdiction under 28 U.S.C. § 1291 because a dismissal of an action with prejudice, even when such dismissal is the product of a stipulation, is a sufficiently adverse—and thus appealable—final decision." *Id.*[4]

---

[4] Our decision in *Huey v. Teledyne, Inc.*, 608 F.2d 1234 (9th Cir. 1979), is not to the contrary. There, putative class plaintiff Huey's motion for class certification was denied in the district court. *Id.* at 1236. Subsequently, Huey's individual action was called for trial, but Huey made no appearance; accordingly, the district court dismissed Huey's action for want of prosecution. *Id.* Huey attempted to appeal the denial of class certification, but this court explained that it lacked jurisdiction over the appeal. We explained that the strong policy of giving trial judges the ability "to achieve the orderly and expeditious disposition of cases" meant that plaintiffs who had failed to prosecute their claims lost the ability to appeal the denial of class certification. *Id.* at 1239 (quoting *Sullivan v. Pacific Indent. Co.*, 566 F.2d 444, 445–46 (3rd Cir. 1977)).

However, *Huey* does not control here. Unlike that proceeding, Baker did not fail to appear before the district court after the class action allegations were struck. In fact, Baker stipulated to dismiss his individual claim, giving up a valuable right in the process. Our cases recognize that a stipulated dismissal of an individual claim is an adverse and appealable final judgment, *Berger*, 741 F.3d at 1065, as does a leading treatise. *See* 7B

B. STRIKING OF CLASS ACTION ALLEGATIONS FROM THE COMPLAINT

Judge Martinez struck the Xbox Plaintiffs' class action allegations from the complaint based largely on Judge Coughenour's finding in *Scratched Disc Litigation* that individual issues of causation predominated in that earlier Xbox defect case. *See Baker*, 851 F. Supp.2d at 1276–77. Judge Martinez determined that, although *Wolin* reversed the holding in Gable that Judge Coughenour relied on, *Wolin* did not undermine the causation analysis set forth in Scratched Disc Litigation. *See id.* at 1279–80. We do not agree.

Judge Martinez cited Judge Coughenour's description of the causation analysis in *Gable* for the notion that individual issues of causation predominated in this case. He observed that Judge Coughenour found persuasive the analysis in *Gable* discussing alternative causes of tire defect manifestation, and that Judge Coughenour followed that reasoning in determining that individual issues of causation predominated in *Scratched Disc Litigation*. *See id.* at 1279.

Judge Martinez's order applied this same causation analysis to reach his conclusion that "[t]he discs at issue in this case are analogous to the tires at issue in *Gable/Wolin* because, as Judge Coughenour recognized, both products may be damaged for any number of reasons . . ." *Id.* This discussion reveals that Judge Martinez relied heavily on *Gable* for its causation analysis.

Charles Allan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice & Procedure § 1802 (3d ed. 2005).

Judge Martinez determined that "nothing in *Wolin* undermines Judge Coughenour's causation analysis . . ." *Id.* at 1280. However, our reading of *Wolin* leads to a different conclusion. In *Wolin*, we expressly and specifically rejected the notion that individual manifestations of the defect precluded resolution of the claims on a class-wide basis. We held that "[a]lthough individual factors may affect premature tire wear, they do not affect whether the vehicles were sold with an alignment defect." 617 F.3d at 1173. We were not persuaded by Land Rover's efforts to distinguish the representative plaintiffs' claims from those of other prospective class members. We noted that all prospective class members alleged the same injury from a defective alignment in their vehicles. All prospective class members sought recovery pursuant to the same legal theories, and Land Rover failed to identify any defenses that were unique to the representative plaintiffs. *See id.* at 1175. In *Wolin*, we clarified that the individual manifestations of the defect were relevant "to the extent of [plaintiffs'] damages and not whether [Gable and Wolin] possess the same interest and suffered the same injury as the class members. . . ." *Id.* (citation, alteration, and internal quotation marks omitted). We concluded in *Wolin*:

> Whether the alignment geometry was defective, whether Land Rover violated its Limited Warranty for defects within the vehicle, and whether Land Rover was unjustly enriched because consumers' vehicles are worth less due to the defect are issues common to all class members and can be litigated together. . . .

Id. at 1176.

Similarly in this case, although individual factors may affect the timing and extent of the disc scratching, they do not affect whether the Xboxes were sold with a defective disc system. Plaintiffs contend that (1) whether the Xbox is defectively designed and (2) whether such design defect breaches an express or an implied warranty are both issues capable of common proof. We agree that, as in *Wolin*, these issues are susceptible to proof by generalized evidence and do not require proof of individual causation. *See id.* at 1172–74, 1176.

Among the common questions identified under the warranty claims are:

> i. The existence of any express warranties made by Microsoft concerning the Xbox 360;
>
> ii. The application of any such express warranties to the claims asserted in this action;
>
> iii. Whether Microsoft has breached any of its express warranties, as alleged herein;
>
> iv. The existence of any implied warranties made by Microsoft concerning the Xbox 360;
>
> v. The application of any such implied warranties to the claims asserted in this action;
>
> vi. Whether Microsoft has breached any of its implied warranties, as alleged herein; . . .

Microsoft contends that plaintiffs' express warranty claim is not amenable to class treatment because individual proof of causation is necessary to determine if there was a breach of its express warranty.

According to Microsoft, like the Tire Warranty at issue in *Wolin*, a determination of whether the allegedly defective Xbox disc system caused a given disc to scratch requires proof specific to that class member. However, this analogy is inapt because plaintiffs' position is that the design defect itself breaches the express warranty.

The most that can be said of the holding in *Wolin* that would be of assistance to Microsoft is our recognition that "early tire wear cases *may* be particularly problematic for plaintiffs seeking class certification . . ." *Id.* at 1173 (emphasis added). Nevertheless, in that case, we "reject[ed] Land Rover's suggestion that automobile defect cases can categorically never be certified as a class." *Id.* In *Wolin*, plaintiffs alleged the existence of a design defect, Land Rover's failure to reveal material facts and Land Rover's unjust enrichment due to the sale of defective vehicles. *See id.* We held that these allegations were "susceptible to proof by generalized evidence. Although individual factors may affect premature tire wear, they [did] not affect whether the vehicles were sold with an alignment defect." *Id.*

Similarly, proof that the allegedly defective disc system caused individual damages is not necessary to determine whether the existence of the alleged design defect breaches Microsoft's express warranty. Rather, plaintiffs' breach of express warranty claim presents a common factual question—is there a defect?—and a common mixed question of law and fact—does that defect breach the express warranty? We conclude, as we did in *Wolin*, that the district court erred in finding that individual issues of causation predominate over these common questions. *See id.*

Microsoft attempts to further distinguish *Wolin* by arguing that, unlike the vehicles in *Wolin*, with their "duck-footed" tires that inevitably caused uneven, premature tire wear, the defect here may never manifest. Microsoft contends that it proved in the *Scratched Disc Litigation* that the alleged defect does not manifest in the vast majority of Xboxes. However, we debunked this argument in *Wolin* by referencing the rule from *Blackie*, 524 F.2d at 901, that "proof of the manifestation of a defect is not a prerequisite to class certification. . . ." *Id.*

What Microsoft is really arguing is that plaintiffs cannot prevail on the merits. *See id.* However, Microsoft's merits-based contention has no place in the determination of whether an action may proceed on a class-wide basis. When the district court relied on *Gable* to conduct this merits-based analysis, *see Baker*, 851 F. Supp.2d at 1279–80, it erred, thereby abusing its discretion.

Microsoft next argues that, "unlike the *Wolin* plaintiffs— who alleged the alignment defect made their luxury vehicles 'worth less,' . . . —Plaintiffs neither claimed the alleged defect made Xbox 360 consoles worth less nor offered common evidence of damage or loss to the proposed class." This argument misconstrues the allegations of the complaint. Like the plaintiffs in *Wolin*, plaintiffs in this case alleged that a design defect diminished the value of the Xbox.

In a footnote, Microsoft also suggests that individual issues of state warranty law predominate for implied warranty claims. However, Microsoft has not identified any material differences in the applicable state implied warranty laws that would require an individualized inquiry regarding the commonly asserted defect. Indeed, Microsoft noted in its appellate brief

the similarity among the implied warranty statutes in Washington, California, Illinois, New York and Michigan.

Finally, Microsoft seeks to characterize plaintiffs' class action allegations as proceeding on the theory that *Wolin* created a *per se* rule requiring class certification of defect claims. Microsoft's contention is premature and misses the mark. As an initial matter, in *Wolin* we did not adopt a *per se* rule requiring class certification of defect claims. Indeed, the converse is true. Rather than adopting a *per se* rule, we simply rejected Land Rover's suggestion that we should categorically decline to certify classes in automobile defect cases. *See Wolin*, 617 F.3d at 1173. Moreover, plaintiffs in this case never moved for class certification. Instead, the district court erroneously ruled that defect allegations are not amenable to resolution on a class-wide basis and struck the class allegations from the complaint. *See Baker*, 851 F. Supp.2d at 1280–81. Microsoft makes several arguments to this court attempting to distinguish *Wolin* and to show that certification of this class would violate Federal Rule of Civil Procedure 23. However, our ruling that the district court's application of comity was misplaced means that these arguments are better addressed if and when plaintiffs move for class certification. It suffices for now to hold that because the district court misread *Wolin*, it did not account for the change in applicable law that made deference to Judge Coughenour's opinion erroneous.[5]

---

[5] Although no circuit has adopted the ALI rule since its publication in 2010 (nor did the Supreme Court endorse it in *Smith*), the district court misapplied the rule by relying on the wrong legal standard. The district court gave a presumption of correctness to Judge Coughenour's prior ruling, but improperly

We express no opinion on whether the specific common issues identified in this case are amenable to adjudication by way of a class action, or whether plaintiffs should prevail on a motion for class certification if such a motion is filed. We hold only that the district court committed an error of law and abused its discretion when it struck the class action allegations from the complaint in contravention of applicable Ninth Circuit precedent.

III. CONCLUSION

We conclude that we have jurisdiction over this appeal despite the parties' stipulation to dismiss the case following the district court's ruling striking the class action allegations. We hold that our decision in *Wolin* is controlling, and the district court's decision striking the class action allegations from the complaint contravened *Wolin* and was an abuse of discretion.

REVERSED and REMANDED for further proceedings consistent with this opinion.

---

determined that a change in law (our decision in *Wolin*) did not rebut the presumption. In other words, assuming *arguendo* the validity of the ALI rule, the district court's misreading of the prior ruling rendered application of the presumption of comity an abuse of discretion. *See United States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc) (abuse of discretion to identify wrong legal standard); *see also Barapind v. Reno*, 225 F.3d 1100, 1109 (9th Cir. 2000) (decision to dismiss under comity doctrine reviewed for abuse of discretion). Given that we can decide this case on a narrower and more well established ground, there is no reason to adopt the ALI rule here.

BEA, Circuit Judge, concurring in the result:

This case presents an important question of first impression in the federal courts of appeal: What principles should guide a federal district court's application of comity to a fellow district court's earlier denial of class certification, when addressing a later motion for class certification by a similar class of plaintiffs? The parties asked this question of Judge Martinez in the district court, who answered ("[i]n the absence of any specific guidance" from our court) by adopting the American Legal Institute's ("ALI") suggestion that the earlier denial of class certification be accorded a rebuttable presumption of correctness. *Baker v. Microsoft Corp.*, 851 F. Supp. 2d 1274, 1278 (W.D. Wash. 2012). We should be aware that litigants in other cases have added to the chorus of voices requesting guidance, reinforcing just how important this question is to effective adjudication of class action litigation. *See, e.g., Ott v. Mortgage Investors Corp. of Ohio*, 2014 WL 6851964 at *13 (D. Or. Dec. 3, 2014) (citing *Baker*, 851 F. Supp. 2d at 1278).

I believe our court owes it to district courts to give them the guidance which Judge Martinez found, quite correctly, was absent. Moreover, I respectfully disagree with the majority opinion's assertion that this case can be decided on the "narrower and more well established ground" that Judge Martinez erred in basing his ruling on the tire defect cases. Maj. Op. at 19 n. 5 (citing *Gable v. Land Rover North America, Inc.*, 2008 WL 4441960 (C.D. Cal. Sept. 29, 2008), rev'd sub nom *Wolin v. Jaguar Land Rover North Am., LLC*, 617 F.3d 1168 (9th Cir. 2010)). That simply was not the basis for Judge Martinez's ruling. Rather, Judge Martinez based his ruling on the only ground urged by Microsoft: that he should defer, for reasons of comity,

to Judge Coughenour's denial of class certification in an earlier, similar class action.[1] For that reason, I do not concur in the majority opinion. Instead, I would hold that a federal district court faced with an earlier denial of class certification in an earlier common dispute heard in a different district court should adopt the rebuttable presumption of correctness suggested by the ALI and adopted by Judge Martinez. But because I conclude that presumption was rebutted in this case, I concur in the result reached by the majority.

I. Background

First, a brief history of this action may be helpful to bring focus. In *Gable*,[2] the district court denied certification of a class of Land Rover owners who alleged a defect in the wheel alignment of their vehicles that caused uneven, premature tire wear. The district court judge believed that the individual issue whether or not the defect actually had manifested itself by causing damage to the tire predominated over the common issue whether the car had defective wheel alignment. *Gable v. Land Rover North America, Inc.*, 2008 WL 4441960, *5 (C.D. Cal. Sept. 29, 2008).

A year later, District Judge Coughenour in *In re Microsoft Xbox 360 Scratched Disc Litigation*, 2009 WL 10219350 (W.D. Wash. Oct. 5, 2009), was presented with a putative class of X-Box owners who, similar to plaintiffs here, alleged their X-Box devices had scratched their video game discs. He relied on the

---

[1] *See infra* footnote 5 and accompanying text.

[2] *Gable v. Land Rover North America, Inc.*, 2008 WL 4441960 (C.D. Cal. Sept. 29, 2008), *rev'd sub nom Wolin v. Jaguar Land Rover North Am., LLC*, 617 F.3d 1168 (9th Cir. 2010).

causation analysis of *Gable* to deny certification of the class. He reasoned that much as each Land Rover owner in *Gable* had to show that the alignment defect had manifested itself by causing tire damage in his car, so too each video game system owner in *Microsoft Xbox 360 Scratched Disc Litigation* had to show that the scratching defect of his game console had manifested itself by damaging a disc. The manifested effect of the product defect would tend to be different as to each plaintiff's tire or disc. Notably, Judge Coughenour ruled against the plaintiffs' attempts to distinguish Gable, saying that the two cases presented identical questions of predominance of individual issues over common class issues. *Microsoft Scratched Disc Litigation* at *7. That scratched disc case was settled later that year.

In 2010, the Ninth Circuit reversed *Gable's* determination of the predominance question. We held the common question whether a defect existed in the wheel alignment predominated over the individual question of the manifestation of the defective wheel alignment through uneven tire wear.[3] Judge Martinez, the district court judge here, heard Microsoft's motion to strike class claims in 2012, and was faced with an unusual conundrum.

The Supreme Court had recently held that federal district courts are expected "to apply principles of comity to each other's class certification decisions when addressing a common dispute." *Smith v. Bayer*, 131 S.Ct. 2368, 2382 (2011). But no Ninth Circuit or

---

[3] The Ninth Circuit reversed under a different name. *Wolin v. Jaguar Land Rover North Am., LLC*, 617 F.3d 1168 (9th Cir. 2010). Thus, *Wolin* refers unambiguously to the Ninth Circuit ruling, while *Gable* refers unambiguously to the district court ruling.

Supreme Court precedent existed to interpret how principles of comity should be applied. Judge Martinez thus adopted the suggestion of the American Legal Institute ("ALI") that an earlier class certification decision of a different district court should be afforded a rebuttable presumption of preclusive effect. Applying this presumption, he held that the presumption of preclusive effect as to Judge Coughenour's ruling in *Microsoft Xbox 360 Scratched Disc Litigation* had not been rebutted, and granted the motion to strike. Judge Martinez did not opine on the issues raised by the motion to strike de novo, and the defendants did not base their motion to strike on any grounds beyond comity.[4]

Was Judge Martinez's application of comity correct? As I have noted, this is a question of first impression in this circuit, and a difficult one. And it puts the wrong question in this case to assert, as the majority does, that Judge Martinez misconstrued this court's opinion in *Wolin*.[5] After all, in the typical comity case,

---

[4] *See* ER 45 (making the comity argument as to the motion to strike, then arguing that "In the Alternative, the Court Should Deny Certification of Plaintiffs' Proposed Classes."). Certification raises issues and procedures quite different from a motion to strike, and defendants were unambiguous in relying on the comity argument alone for their motion to strike. Plaintiffs replied that "comity does not apply" because *Wolin* was an intervening change in law; as the ALI explains, the comity presumption of correctness is rebutted "when the basis for an earlier denial. . . is no longer present." Dkt. 23 at 17 (citing Am. Law. Inst., *Principles of the Law of Aggregate Litigation* § 2.11 cmt. c. (2010)).

[5] I agree that Judge Martinez misunderstood *Wolin*. *See* Part III, infra. He did not see *Wolin* as a change in the law, despite Judge Coughenour's reliance on the decision *Wolin* overruled. But I do not agree that Judge Martinez relied on *Wolin*, since nothing in his order suggests such reliance. To the contrary, the

where a US court is considering whether to give effect to a foreign judgment, "the mere assertion of [a] party that the [earlier] judgment was erroneous in law or in fact" does not suffice to disrupt the presumption that the foreign judgment be given legal effect. *Asvesta v. Petroutsas*, 580 F.3d 1000, 1011 (9th Cir. (2009)) (quoting *Hilton v. Guyot*, 159 U.S. 113 (1895)). In those cases, a "special reason why the comity of this nation" should not attach is needed. *Id.* Perhaps such solicitousness makes less sense in the federal district court context; since federal district court judges are not sovereigns, their decisions might not require a "special reason" to be ignored. But if that is the conclusion we come to, we should say so.

There is no governing precedent from the Supreme Court or from our court discussing application of principles of comity to orders of denials of class certification entered by district courts in cases involving similar class claims. But the notion of comity between federal district courts under federal common law is not new to our circuit.

Indeed, as Judge Martinez noted, comity between federal district courts in this circuit has long encompassed decisions by the courts designed to promote the smooth workings of the federal judiciary and to avoid the embarrassment of inconsistent results. *Baker*, 851 F.Supp.2d at 1278. For instance, in *Church of Scientology of California v. U.S. Dept. of*

---

order suggests he relied on Judge Coughenour's earlier ruling. Moreover, there is no authority the majority can cite for the proposition that if Judge Martinez had understood *Wolin* as a change in the law, he was obliged to refuse comity deference to Judge Coughenour's earlier ruling. Indeed, that is the very question the majority should have answered in this case, and with which this concurrence deals.

Army, 611 F.2d 738 (9th Cir. 1979), the Church of Scientology filed a request pursuant to the Freedom of Information Act for any government materials involving itself or its founder, L. Ron Hubbard. The relevant agency (the Department of the Army) refused to release a certain document. Litigation involving this document proceeded in the federal district courts of the Central District of California and of the District of Columbia. The California district court declined to compel the release of the document on the grounds that the D.C. court was considering the same issue, and the issue was better litigated in D.C. On appeal, the Ninth Circuit held that since the district court in D.C. had already issued its decision, which had been reversed by the D.C. Circuit and remanded for future proceedings, the interests of comity were best served by deferring to the D.C. case, where proceedings were further advanced.[6]

Since the recognition and application of comity to courts' earlier decisions is a matter of federal common law, and no Supreme Court precedent guides our inquiry, this court has discretion to craft the rules of federal district court comity it thinks should apply. Since Judge Martinez's decision cannot be affirmed or

---

[6] The more common federal comity case occurs when a federal district court declines jurisdiction over a case on the grounds that an action relating to the same subject matter has already been commenced in another district. The first-to-file rule is technically an abdication by the district court; if subject matter jurisdiction exists, the second court is not required by any constitutional principle to desist. It does so for the unremarkable reason that the public interest—conservation of judicial resources and minimization of the risk of inconsistent decisions—is better served by so doing.

reversed, in my view, without explaining whether his vision of comity was correct, I turn to that question.

II. A Framework for Comity

I suggest the following framework for district courts faced with earlier class certification denials for the same or similar plaintiff classes. First, a district court that is faced with the earlier ruling of another district court denying class certification for a similar putative class should adopt as a rebuttable presumption that the litigation is not amenable to class action treatment.[7] Second, that presumption may be rebutted by proof from the putative class representative that shows a change in factual or legal circumstances since the entry of the earlier order which change rebuts the presumption. Alternatively, the presumption may be rebutted by a showing that the earlier district court ruling was based on clear error. Finally, this court should review a district court's decision on whether the rebuttable presumption attaches or has been rebutted for abuse of discretion. How does this approach play out; and, will it work?

A. An Earlier Denial of Certification of a Similar Class Should Give Rise to a Rebuttable Presumption That the Litigation is Not Amenable To Class Treatment

The basic posture of this case is not new: a defendant faces a putative class of plaintiffs, but there is substantial uncertainty as to whether the putative class will be able to satisfy Federal Rule of Procedure 23's requirements for class treatment. As the Supreme

---

[7] Thus, I would have the district court presented with a motion to strike class allegations, as in this case, give comity deference to an earlier ruling on class certification as to similar class claims.

Court has recognized, the decision whether or not the class is certified is usually the most important ruling in such a case; once a class is certified, plaintiffs who brought claims of even dubious validity can extract an "in terrorem" settlement from innocent defendants who fear the massive losses they face upon an adverse jury verdict. *See, e.g., AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1752 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.").

Thus, plaintiff's counsel need not present meritorious claims to achieve victory; they need obtain only a favorable class certification ruling. In light of the minimal costs of filing a class complaint, an obvious strategy suggests itself: keep filing the class action complaint with different named plaintiffs[8] until some judge, somewhere, grants the motion to certify. So long as such a decision is reached while the plaintiffs who have not yet filed are numerous enough to justify class treatment, the plaintiffs will have a certified class that they can use to extract an in terrorem settlement.

If in terrorem settlements are bad, duplicative lawsuits employed to extract such a settlement are worse. It is no surprise, then, that appellate courts have long been trying to solve this problem. One solution was put forth by the Seventh Circuit in *In re Bridgestone/Firestone, Inc. Tires Product Liability Litigation*, 333 F.3d 763 (7th Cir. 2003). There, the Seventh Circuit held that an earlier denial of class certification would be binding on all putative members

---

[8] Different named plaintiffs would be required because the original named plaintiff, as party to the suit, would be precluded from relitigating the matter. *See Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (describing basic principles of claim and issue preclusion).

of the class, whether or not named in the action, so long as they were adequately represented by the named litigants and class counsel. Thus, there would be an irrebuttable presumption that an earlier denial of class certification had binding effect.

However, the Supreme Court abrogated *Bridgestone/Firestone in Smith v. Bayer*. *Bayer*, 131 S.Ct. at 2380–81. There, the Court made clear that despite "policy concerns relating to use of the class action device," individuals not present before the district court could not be bound by its judgment, as the court simply lacked authority to bind them because they were not parties to the litigation, nor did they fit into any of the narrow exceptions to the party preclusion rule announced in *Taylor v. Sturgell*, 553 U.S. 880 (2008). This was not, the Supreme Court said, to deny the force of defense counsel's policy objection, but to state that "principles of stare decisis and comity among courts" would have to "mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs." *Bayer*, 131 S.Ct. at 2380–81.

Thus, two principles guide application of comity in this context. First, a district court cannot treat an earlier denial of certification of class status to a similar plaintiff class as conclusive proof that the subject matter is not amenable to class treatment. *Bayer*, 131 S.Ct. at 2380–81. Second, district courts should adopt an approach to comity which resolves (or at least reduces) the policy concern of repeated certification efforts by plaintiffs seeking an in terrorem settlement. *AT&T Mobility LLC*, 131 S.Ct. at 1752 (2011). Taken together, these principles recommend that district courts be given a way to clear their dockets of questionable successive class certification requests, while ensuring that putative class members who have

unearthed new evidence or new law in favor of certification, or clear error in the earlier ruling, not be foreclosed by the failed efforts of their predecessors.

In light of the need to distinguish between legitimate and illegitimate successive class certification request, a presumption of correctness to earlier denials of certification that can be rebutted by a showing of changed factual or legal circumstances, or earlier clear error, makes sense. First, the district court is justified as a matter of procedure in assuming that the earlier denial of certification was correct; if it was not, plaintiffs in the earlier action could have pursued an interlocutory appeal[9] and had the decision vacated; the inference of correctness from its continued existence is reasonable.[10] Second, if the presumption of correctness is rebuttable, this rule does not run afoul of the Supreme Court's teaching in *Smith v. Bayer* that unnamed members of a putative class cannot be bound by the denial of certification. Plaintiffs are given an opportunity to challenge that earlier denial of class certification by rebutting the presumption, and the presumption will be rebutted in any case where there are good grounds to reconsider the initial determination that the subject matter of the case is not amenable to aggregate treatment. Third,

---

[9] An interlocutory appeal of this order is explicitly allowed under Federal Rule of Civil Procedure 23(f), which allows circuit courts to permit an immediate appeal from the denial of class certification "if a petition for permission to appeal is filed with the circuit clerk within 14 days" of the denial.

[10] Or, as in this case, plaintiffs could voluntarily dismiss their claims with prejudice and appeal as of right. I concur with the opinion's jurisdictional and standing analysis based on Berger, so it is common ground that plaintiffs have created proper appellate jurisdiction in this manner.

the policy concern about the cost of defending against successive certification motions is reduced by putting the onus on plaintiffs to explain why the earlier ruling should not be given effect: so long as there is no new evidence, change in the law, or clear error in the earlier dismissal, defendants can rely on their first victory to stave off in terrorem settlements.[11] Fourth, as the district court noted in this case, adoption of a rebuttable presumption has scholarly support. *See Baker v. Microsoft Corp.*, 851 F.Supp.2d 1274, 1278 (W.D. Wash. 2012) (citing ALI Principles of the Law of Aggregate Litigation).[12]

In particular, when there has been a change in the law governing whether a matter is amenable to class treatment—as there was in the Range Rover wheel alignment case—that should be grounds for rebutting the presumption in favor of the earlier ruling which was based on abrogated law and which denied class certification. This is because there are pro-class action policy arguments that we should not ignore. In particular, class actions are an important way of resolving so-called "negative value claims"; that is,

---

[11] My suggestion balances the finality value of a definitive ruling in defendants' favor with the danger of an erroneous first denial of class certification curtailing legitimate claims by allowing the second district court to engage in clear-error review of the first court's ruling.

[12] Plaintiffs in this case allege that a rebuttable presumption serves to unduly constrain district court discretion. But discretion does not mean *unbounded* discretion, and the policy arguments against duplicative class actions recognized by the Supreme Court in *Smith v. Bayer* require some restrictions on the discretion of district courts to certify a class. 131 S.Ct. at 2381. A rebuttable presumption, coupled with abuse-of-discretion review by this court, thus preserves district court discretion without allowing district courts to stray too far.

claims that are legitimate, but cost too much to litigate individually. Thus, denying class certification to claims that can be treated in the aggregate is equivalent to denying those claims on the merits. When the law has changed to recognize those claims as amenable to aggregate treatment, applying that change to give the new plaintiff an opportunity to represent the class makes sense. Moreover, since the change in the law has recognized a claim that would not otherwise have been viable, this is not a "second bite at the apple" of the sort animating claim preclusion principles. Instead, the change in the law has presented a different apple.

B. A Decision Which Applies Comity's Presumption of Correct Denial of Certification Should Be Reviewed on an Abuse of Discretion Standard

It is settled law that the decision to apply principles of comity is discretionary, not mandatory. *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1140 (9th Cir. 2001). Therefore, this court reviews a district court's decision to grant comity deference to a state or tribal court's determination of an issue for abuse of discretion. *Stock West Corp. v. Taylor*, 964 F.2d 912, 918 (9th Cir. 1992). This principle has been extended to comity to federal court decisions; a district court's decision to dismiss an action under the federal comity doctrine's "first to file" rule is reviewed for an abuse of discretion. *Barapind v. Reno*, 225 F.3d 1100, 1109 (9th Cir. 2000).

Since the district court's choice to apply principles of comity is discretionary, an abuse of discretion standard of review should be applied. Moreover, I see no justification for a *less* stringent standard of review

for a decision to give preclusive effect to the substance of an order than to the decision to defer to duplicative litigation as in the "first to file" context. Thus, I suggest adoption for use here of the familiar abuse of discretion standard: a district court abuses its discretion when it identifies the wrong legal standard for decision, or makes findings of fact (or applications of the facts it has found) that are "illogical, implausible, or without support in inferences that may be drawn from facts in the record." *U.S. v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc).

III. This Case

Applying the framework enunciated above, I conclude that the rebuttable presumption that individual issues predominated over class-wide issues was rebutted here.

At the first step, Judge Martinez correctly applied comity's rebuttable presumption in favor of Judge Coughenour's earlier denial of class certification. At the second step, however, the district court erred by finding that *Wolin* was not a change in law that rebutted the presumption in favor of the earlier denial of class certification. The district court made this mistake because it misunderstood the grounds of Judge Coughenour's earlier denial of class certification.

Judge Martinez concluded that the presumption had not been rebutted because the *Gable/Wolin* Land Rover litigation was distinguishable from the scratched disc litigation. However, the language he quoted from Judge Coughenour's earlier denial was language justifying Judge Coughenour's conclusion that *Gable* could not be distinguished from the X-Box scratch case. *In re Microsoft Xbox 360 Scratched Disc Litigation*, 2009 WL 10219350, at *7 (W.D. Wash. Oct.

5, 2009) ("Plaintiffs attempt to distinguish *Gable*, but fail . . . The *Gable* court acknowledged that every Land Rover suffered the same design flaw, but nonetheless refused to certify the class, because the defect had not *manifested* in every Land Rover. That is exactly the case here."). Judge Martinez committed two errors of law. First, he read Judge Coughenour's earlier denial of class certification as based on a finding that the *Gable/Wolin* decision was distinguishable from the scratched disc litigation; to the contrary, Judge Coughenour had stated that the scratched disc and tire wear actions were not distinguishable. Second, it was legal error for him to defer to Judge Coughenour's denial of class certification in light of the change in law wrought by *Gable's* reversal in *Wolin*, as discussed fully in the majority opinion. Maj. Op. at 14–15.

Thus, Judge Martinez abused his discretion by granting comity deference to an earlier denial of class certification despite an intervening change in the law that should have rebutted the presumption in favor of that denial. Notably, Microsoft made no argument in the district court in support of the motion to strike other than reliance on comity; its arguments about the propriety of class treatment in this case were only to justify the "alternative relief" of denial of certification. Since the district court has not yet opined on whether plaintiffs' class should be certified, I agree that this issue should remain open on remand, where defendants will be free to renew their motion to deny certification.

IV. Conclusion

Our court should not misconstrue the district court rulings it reviews, and it should give guidance to district courts who face difficult questions of law. As the majority opinion does not satisfy either of these duties, I concur in its result, but not its reasoning.

APPENDIX B

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT SEATTLE

[Filed 10/16/12]

No. 11-cv-00722-RSM

SETH BAKER, et al.,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

STIPULATION AND ORDER GRANTING PLAINTIFFS' MOTION TO DISMISS WITH PREJUDICE

The Honorable Ricardo S. Martinez

STIPULATION

The parties, by and through their attorneys of record, stipulate to the Court's entry of the proposed Order set forth below, dismissing this case with prejudice, directing entry of judgment, and reserving questions of appealability. In support of this request, the parties represent the following:

1. Plaintiffs filed this action on April 28, 2011. *See* Dkt. 1.

2. On March 27, 2012, the Court entered its Order on Defendant's Motion to Strike Plaintiffs' Class Allegations, granting Microsoft's Motion to Strike. *See* Dkt. 32.

3. On June 12, 2012, the United States Court of Appeals for the Ninth Circuit entered an Order "in its discretion, den[ying] the [Plaintiffs'] petition for permission to appeal the district court's March 27, 2012 order."

4. On September 25, 2012, Plaintiffs filed a Motion to Dismiss with Prejudice. *See* Dkt. 35. In that Motion, Plaintiffs explained that "[a]fter the Court has entered a final order and judgment, Plaintiffs intend to appeal the Court's March 27, 2012 order (Dkt. 32) striking Plaintiffs' class allegations." *Id.*

5. Microsoft does not intend to oppose Plaintiffs' Motion to Dismiss because Fed. R. Civ. P. 41(a)(1)(A)(i) permits them to dismiss their case voluntarily. Microsoft does contend, however, that Plaintiffs will have no right to appeal the Court's Order striking Plaintiffs' class allegations after entry of their requested dismissal.

6. This Stipulation is not filed pursuant to a settlement agreement, nor was Plaintiffs' Motion to Dismiss filed pursuant to a settlement agreement. The parties have not entered into any settlement of Plaintiffs' claims.

7. Based on the foregoing, the parties stipulate and agree that the Court may enter the following Order dismissing this matter with prejudice, reserving to all parties their arguments as to the propriety of any

appeal. Any arguments as to the propriety of an appeal shall be addressed in the United States Court of Appeals for the Ninth Circuit, if and when Plaintiffs file a notice of appeal.

Respectfully submitted this 16th day of October, 2012.

Davis Wright Tremaine LLP

By */s/ Stephen M. Rummage*
Stephen M. Rummage, WSBA # 11168
Fred B. Burnside, WSBA # 32491
1201 Third Avenue, Suite 2200
Seattle, Washington 98101-3045
Telephone: (206) 757-8136
Facsimile: (206) 757-7700

Charles B. Casper
John Papianou
Montgomery, McCracken, Walker & Rhoads, LLP
123 S. Broad Street
Philadelphia, PA 19109
Attorneys for Microsoft Corporation

KELLER ROHRBACK LLP

By */s/ Amy Williams-Derry*
Amy Williams-Derry, WSBA #28711
Mark A. Griffin, WSBA #16296
1201 Third Avenue, Suite 3200
Seattle, WA 98101
Telephone: (206) 623-1900

CHITWOOD HARLEY HARNES LLP
Gregory E. Keller, WSBA #13040
Darren T. Kaplan
2300 Promenade II
1230 Peachtree Street, N.E.
Atlanta, Georgia 30309
Telephone: (404) 873-3900

KOPELOWITZ OSTROW FERGUSON WEISELBERG KEECHL
Jeffrey M. Ostrow
200 S.W. 1st Avenue, 12th Floor
Fort Lauderdale, FL 33301
Telephone: (954) 525-4100

STRITMATTER KESSLER WHELAN COLUCCIO
Paul L. Stritmatter, WSBA # 4532
Kevin Coluccio, WSBA # 16245
Brad J. Moore, WSBA # 21802
200 Second Avenue West
Seattle, Washington 98119
Telephone: (206) 448-1777

WASSERMAN COMDEN CASSELMAN & ESENSTEN LLP
Melissa M. Harnett
Gregory B. Scarlett
5567 Reseda Blvd, Suite 330
Tarzana, California 91356
Telephone: (818) 705-6800
Facsimile: (818) 996-8266

Attorneys for Plaintiffs

ORDER

Based on the foregoing Stipulation, the Court GRANTS Plaintiffs' Motion to Dismiss with Prejudice, with all parties to bear their own costs and fees. The Court hereby directs the Clerk to enter Judgment accordingly and close this case.

IT IS SO ORDERED.

DATED this 16 day of October, 2012.

/s/ Ricardo S. Martinez
RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

Presented By:

Davis Wright Tremaine LLP
Attorneys for Microsoft Corporation

By /s/ Stephen M. Rummage
Stephen M. Rummage, WSBA #11168
Fred B. Burnside, WSBA # 32491
1201 Third Avenue, Suite 2200
Seattle, Washington 98101-3045
Telephone: (206) 622-3150
Fax: (206) 757-7700
E-mail: steverummage@dwt.com
fredburnside@dwt.com

RECORD AND BRIEFS

No. 15-457

Supreme Court, U.S.
FILED
DEC 14 2015
OFFICE OF THE CLERK

In The

Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

v.

SETH BAKER, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DARREN T. KAPLAN
Counsel of Record
STUEVE SIEGEL HANSON LLP
1359 Broadway, Suite 2001
New York, NY 10018
(212) 999-7370
kaplan@stuevesiegel.com

MARK A. GRIFFIN
AMY WILLIAMS-DERRY
BENJAMIN GOULD
KELLER ROHRBACK L.L.P.
1201 Third Avenue,
Suite 3200
Seattle, WA 98101
(206) 623-1900

[Additional Counsel Listed On Signature Page]

QUESTION PRESENTED

In this proposed class action, the named plaintiffs have not moved for class certification. Instead, the defendant, before answering the complaint, moved to strike the class allegations from the complaint. The motion was granted, thus dismissing the class claims, and the named plaintiffs then voluntarily dismissed their individual claims by stipulation. The court of appeals exercised appellate jurisdiction and reversed the striking of the class claims, but withheld any opinion on whether the district court should ultimately grant or deny class certification. The question presented by the petition is:

> Should the Court grant certiorari to consider whether the federal courts of appeals have jurisdiction to review a denial of class certification after the named plaintiffs have voluntarily dismissed their individual claims with prejudice?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
INTRODUCTION	1
STATEMENT OF THE CASE	2
I. Factual background	2
II. Procedural history	4
REASONS FOR DENYING THE WRIT	7
I. This case does not present the question that Microsoft asks the Court to decide	8
II. The circuit split is illusory	13
III. The decision below is correct	17
CONCLUSION	23

TABLE OF AUTHORITIES

Page

CASES

Baker v. Microsoft Corp., 851 F. Supp. 2d 1274 (W.D. Wash. 2012), *rev'd*, 797 F.3d 607 (9th Cir. 2015) 8, 9

Baker v. Microsoft Corp., No. 12-80085 (9th Cir. June 12, 2012) 11

In re Bemis Co., 279 F.3d 419 (7th Cir. 2002) 11

Bowe v. First of Denver Mortg. Investors, 613 F.2d 798 (10th Cir. 1980) 13

Camesi v. Univ. of Pittsburgh Med. Ctr., 729 F.3d 239 (3d Cir. 2013) 15

Catlin v. United States, 324 U.S. 229 (1945) 17, 18

Chavez v. Illinois State Police, 251 F.3d 612 (7th Cir. 2001) 16, 17

Chrysler Motors Corp. v. Thomas Auto Co., 939 F.2d 538 (8th Cir. 1991) 10

Cobbledick v. United States, 309 U.S. 323 (1940) 21

Concha v. London, 62 F.3d 1493 (9th Cir. 1995) 16, 21, 22

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 18, 19

Druhan v. American Mutual Life, 166 F.3d 1324 (11th Cir. 1999) 14

Gable v. Land Rover N. Am., Inc., No. 07-0376, 2008 WL 4441960 (C.D. Cal. Sept. 29, 2008) 5

TABLE OF AUTHORITIES—Continued

Page

Gary Plastics Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 176 (2d Cir. 1990) 14, 15

Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013) 15, 16

Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79 (2000) 18

Hertz Corp. v. Friend, 559 U.S. 77 (2010) 20

Hicks v. NLO, Inc., 825 F.2d 118 (6th Cir. 1987) 10

Huey v. Teledyne, Inc., 608 F.2d 1234 (9th Cir. 1979) 13

In re Microsoft Xbox 360 Scratched Disc Litig., No. 07-1121, 2009 WL 10219350 (W.D. Wash. Oct. 5, 2009) 4

OFS Fitel, LLC v. Epstein, Becker & Green, P.C., 549 F.3d 1344 (11th Cir. 2008) 15

Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs & Participating Emps., 134 S. Ct. 773 (2014) 19, 20

Rhodes v. E.I. du Pont de Nemours & Co., 636 F.3d 88 (4th Cir. 2011) 16

Scott v. Family Dollar Stores, Inc., 733 F.3d 105 (4th Cir. 2013) 11

Sullivan v. Pacific Indemnity Co., 566 F.2d 444 (3d Cir. 1977) 15

United States v. Procter & Gamble Co., 356 U.S. 677 (1958) 18

TABLE OF AUTHORITIES—Continued

Page

United States v. Rent-a-Homes Sys. of Ill., Inc., 602 F.2d 795 (7th Cir. 1979) 10

Vinole v. Countrywide Home Loans, Inc., 571 F.3d 935 (9th Cir. 2009) 12

Volvo Constr. Equip. N. Am. v. CLM Equip. Co., 386 F.3d 581 (4th Cir. 2004) 10

Wolin v. Jaguar Land Rover N. Am., LLC, 617 F.3d 1168 (9th Cir. 2010) 5, 6

Zivotofsky ex rel. Zivotofsky v. Clinton, 132 S. Ct. 1421 (2012) 11

STATUTES AND REGULATIONS

28 U.S.C. § 1291 ..... 16, 17, 18

28 U.S.C. § 1292(b) 21, 22

Fair Labor Standards Act, 29 U.S.C. §§ 201-219 ..... 15, 16

RULES

Fed. R. Civ. P. 12(b)(6) 1

Fed. R. Civ. P. 23 ..... 9, 15, 16

Fed. R. Civ. P. 23(b)(3) 4, 5

Fed. R. Civ. P. 23(f) ..... *passim*

INTRODUCTION

Petitioner Microsoft Corporation ("Microsoft") seeks review of a question that this case does not present. It asks the Court to grant certiorari to decide whether "a federal court of appeals has jurisdiction to review an order denying class certification after the named plaintiffs voluntarily dismiss their claims with prejudice." Pet. i. The district court in this case, however, did not deny class certification. Instead, on Microsoft's motion, the district court "struck"—i.e., dismissed—the class claims from the complaint. The district court ruled that another district court's denial of class certification in earlier litigation prevented the current plaintiffs from asserting their class claims as a matter of law.

This case thus presents a different, and much rarer, procedural posture than an appeal following a denial of class certification. This case more resembles one in which a district court disposes of less than all claims on a motion to dismiss under Rule 12(b)(6), and then the plaintiff voluntarily dismisses the remaining claims to seek appellate review. Microsoft neither challenges that uncontroversial practice nor asks the Court to review its propriety. By its own terms, Microsoft's petition is limited to cases where a district court has denied class certification.

Even if the question Microsoft raises were properly presented, there is no genuine conflict among the circuits that would justify granting the petition. Microsoft's cases generally do not speak to

the question on which Microsoft seeks review, so resolution of the question presented must await further development in the lower courts. Certiorari should be denied.

STATEMENT OF THE CASE

I. Factual background

The Xbox 360 was introduced in 2005 and is Microsoft's second-generation video-gaming console. Until its sales ceased in 2013, more than 25 million Xbox 360s were sold in the United States on the strength of Microsoft's massive marketing campaign.

Xbox 360 video games were sold on discs priced between $30 and $60. The discs were played on an optical disc drive that accommodated compact discs and DVDs as well as game discs. CA9 ER 535, ¶¶ 17-19.

Optical disc drives are not just found in the Xbox 360—they are also found in cars, notebook computers, portable DVD players, and camcorders. Engineers have long known that discs spinning in these drives may be subjected to slight movement, and they have learned to counter this potential problem—and to protect the spinning discs from damage—with simple, inexpensive measures. *Id.* at 536, ¶¶ 25, 26.

The Xbox 360's disc drive, though, cannot withstand even small unintentional movements that are well within normal expected use. *Id.* at 537, ¶ 27.

Even a vibration induced from across the room or some other source of indirect force can be too much for the Xbox 360. *See id.* at 537, ¶¶ 27-28. These movements can cause an Xbox 360 disc to become decoupled from the spindle that rotates it, and to crash into the drive's internal components. *Id.* at 536, ¶¶ 23-24. This collision creates a telltale pattern of concentric scratches on the disc that prevent the disc's data from being played by the drive. The disc is rendered permanently useless. *Id.* at 536, ¶ 23.

Although Microsoft publicly denied that the Xbox 360 has a design defect that scratches discs, it did begin a "disc replacement program" in 2007. *Id.* at 537-38, ¶¶ 30-31, 33. Under this program, Microsoft would replace some—but not all—damaged game discs for a fee of $20. *Id.* at 538-39, ¶¶ 33-34, 36. The cost of pressing and shipping a replacement disc is well under a dollar. *Id.* at 539, ¶ 35.

Microsoft suggests that only a small minority of Xbox 360 owners have experienced disc damage, Pet. 3, 14 n.4, but in fact Microsoft does not actually know how many have suffered a scratched disc. While some Xbox 360 owners have directly complained to Microsoft about a scratched disc, CA9 ER 36, not all customers who experience a problem with a product will complain. Some customers may contact their retailer rather than the manufacturer. Others may not be able to find time to submit a complaint at all. The Xbox 360's warning sticker and instruction manual—which imply that any disc damage is the customer's fault—will also have deterred many an

innocent customer from complaining. Pet. 2-3. Microsoft cannot rely on the number of customer complaints it purportedly logged to minimize its design defect.

II. Procedural history

1. The prehistory of the present case begins in 2007, with earlier class action litigation. In that year, a number of class actions involving the Xbox 360 design defect were consolidated in the U.S. District Court for the Western District of Washington. In due course, the plaintiffs in that earlier litigation moved for class certification under Rule 23(b)(3).

The district court denied the motion. The court ruled that although every Xbox 360 may suffer from a design defect, individual issues of damages and causation predominated. *See* Fed. R. Civ. P. 23(b)(3). These individual issues predominated, concluded the district court, because the design defect had not "manifested" itself—i.e., had not scratched discs—in most of the Xbox 360 consoles. *In re Microsoft Xbox 360 Scratched Disc Litig.*, No. C07-1121-JCC, 2009 WL 10219350, at *6 (W.D. Wash. Oct. 5, 2009).

For these conclusions, the district court in that earlier Xbox 360 litigation relied heavily on a district court decision involving the tire alignment in Land Rover vehicles. *Id.* A number of Land Rover owners had alleged that their vehicles' tire alignment was defectively designed, and moved for class certification. The district court denied the vehicle owners' motion because the allegedly defective tire alignment had not

yet manifested itself in all vehicles by prematurely wearing down the tires. *Gable v. Land Rover N. Am., Inc.*, No. CV07-0376 AG (RNBx), 2008 WL 4441960, at *4-5 (C.D. Cal. Sept. 29, 2008), *rev'd sub nom. Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168 (9th Cir. 2010). Like the district court in the earlier Xbox 360 litigation, the court presiding over the Land Rover litigation concluded that this lack of manifestation created individual issues of causation and damages that prevented certification under Rule 23(b)(3). *Id.*

It was in reliance on this Land Rover case that the district court in the earlier Xbox 360 litigation denied class certification. The plaintiffs in that Xbox 360 litigation then petitioned to appeal under Rule 23(f). When their petition was denied, the plaintiffs settled their individual claims, ending that case.

Meanwhile, the named plaintiffs in the Land Rover case secured an interlocutory appeal under Rule 23(f), and the court of appeals reversed the district court's denial of class certification. In *Wolin v. Jaguar Land Rover North America, LLC*, the Ninth Circuit held that manifestation of a design defect was not a prerequisite to class certification. Because the plaintiffs had alleged the existence of a "common defect"—an alignment defect that existed in every class member's vehicle—the existence of the defect itself, not its manifestation, was the core question. And the existence of the defect was "susceptible to proof by generalized evidence." 617 F.3d at 1173. For that reason, common issues predominated, making Rule 23(b)(3) certification proper.

2. The plaintiffs in the present action—Seth Baker, Matthew Danzig, James Jarrett, Nathan Marlow, and Mark Risk (collectively, "Baker")—filed their original complaint in April 2011, relying on the Ninth Circuit's intervening decision in *Wolin*. Akin to the *Wolin* plaintiffs, Baker alleged that the Xbox 360's inherent design defect was uniform in all consoles sold, so that each console breached Microsoft's warranties in the same way.

Before answering, Microsoft filed a "Motion to Strike Plaintiffs' Allegations, or, in the Alternative, Deny Certification of Plaintiffs' Proposed Classes." Baker had no chance to conduct any new discovery or to bring a motion for class certification.

After briefing, the district court entered an order explicitly striking Baker's class allegations. The district court thought that it was required to defer to the denial of class certification in the earlier Xbox 360 litigation unless the governing law had changed in the meantime. And, in the district court's view, *Wolin* had not undermined the earlier denial.

Although the district court did not deny a motion for class certification, Baker filed a petition to appeal under Rule 23(f). The petition was denied. The parties then filed a stipulation and proposed order dismissing the case with prejudice. Baker made it clear to both Microsoft and the district court that he was dismissing the action to secure appellate review of the order striking the class action allegations. Pet. App. 36a. The district court granted the dismissal

with prejudice, "reserving to all parties their arguments as to the propriety of any appeal." *Id.* at 36a-37a.

3. After concluding that it had appellate jurisdiction, *id.* at 11a-12a, the court of appeals, relying on *Wolin*, reversed the district court's striking of class allegations. Proof that the defective disc drive manifested itself in scratched discs was "not necessary" because the claims presented two common questions: (1) the existence of the design defect *vel non*, and (2) whether that defect breached a warranty. *Id.* at 16a. Thus, the district court had erroneously struck the class allegations from the complaint. *Id.* at 18a. The court of appeals, however, withheld any opinion on whether Plaintiffs would eventually be able to certify a class. *Id.* at 19a.

REASONS FOR DENYING THE WRIT

There are three independently sufficient reasons to deny certiorari. First, because of its unusual procedural history, this case does not raise Microsoft's question presented. Second, the circuit split on which Microsoft relies is illusory. And third, the court of appeals' decision faithfully applied basic jurisdictional principles from which Microsoft now seeks to depart.

I. This case does not present the question that Microsoft asks the Court to decide.

Microsoft asks this Court to decide whether a court of appeals has jurisdiction "to review an order denying class certification" after named plaintiffs have voluntarily dismissed their claims with prejudice. Pet. i. But this case does not present that question.

1. The district court never entered an order denying class certification. *See* Pet. App. 18a. Instead, before answering, Microsoft moved for two alternative forms of relief: "to strike Plaintiffs' class allegations or, alternatively, to deny class certification." *Baker v. Microsoft Corp.*, 851 F. Supp. 2d 1274, 1278 (W.D. Wash. 2012), *rev'd*, 797 F.3d 607 (9th Cir. 2015). Citing another district court's denial of class certification in the earlier Xbox 360 litigation, Microsoft argued that Baker was trying to "re-litigate" the class certification decision. CA9 ER 28. It urged the district court to "invoke principles of comity" to strike the class claims. *Id.* at 39-45. The district court agreed that it was required to defer to the earlier denial of class certification. *Baker*, 851 F. Supp. 2d at 1279-81. As a remedy, the district court explicitly chose the first form of relief that Microsoft sought—the striking of class allegations—and ordered that the class allegations be "STRICKEN." *Id.* at 1281.

Because the district court never entered an order denying class certification, this case does not present the question Microsoft asks the Court to decide. What is more, the district court's order striking Plaintiffs'

class claims differed significantly from an order denying class certification—it conducted no independent Rule 23 analysis, and simply "employ[ed] principles of comity in deferring to the [prior] Certification Denial Order." *Id.* at 1279. The concurring opinion in the court of appeals was correct to say that class "[c]ertification raises issues and procedures quite different from a motion to strike." Pet. App. 23a n.4 (Bea, J., concurring in the result).

This difference is evident from the district court's order, which reads more like an order granting a motion to dismiss on preclusion grounds than it does a class-certification denial. Like an order granting a partial motion to dismiss, the order here ruled that Baker could not bring his class claims as a matter of law, and dismissed those claims from the complaint. The district court treated the denial of class certification in the earlier Xbox 360 litigation as a decision that it lacked the power to "overrule," and ruled that the earlier class denial effectively precluded Baker from asserting class claims. *See Baker*, 851 F. Supp. 2d at 1280 ("Plaintiffs cannot ask this Court—under the guise of a separate litigation—to step into the shoes of the Ninth Circuit and effectively overrule a fellow member of this court."). Then, after an unsuccessful Rule 23(f) petition, Baker stipulated to a voluntary dismissal of his remaining claims—i.e., his individual claims—with prejudice.

This case is thus analogous to those where a district court finally disposes of less than all claims, and the prospective appellant then secures a final

appealable judgment by stipulating to a dismissal of its remaining claims. Microsoft does not argue that appellate jurisdiction is lacking in such cases, and indeed authority supports the exercise of appellate jurisdiction in those circumstances.[1] In any event, Microsoft has not asked the Court to decide whether a plaintiff can secure appellate review of dismissed claims by voluntarily dismissing its remaining claims.

2. The distinction between an order striking class claims and an order denying a motion for certification matters in another way as well. To support its argument that the court of appeals lacked jurisdiction, Microsoft relies heavily on the availability of discretionary appeals under Rule 23(f). Pet. 17-19, 22. But the court of appeals' exercise of jurisdiction here can implicate Rule 23(f), as Microsoft urges, only if Rule 23(f) applies not merely to grants or denials of class certification, but also to orders striking class allegations. Hence, if the Court grants certiorari here, it will be compelled to answer a collateral question about the scope of Rule 23(f).

Both the decision below and the court of appeals' earlier denial of Baker's Rule 23(f) petition declined to address the scope and applicability of Rule 23(f).

---

[1] *See Volvo Constr. Equip. N. Am. v. CLM Equip. Co.*, 386 F.3d 581, 591 n.9 (4th Cir. 2004); *Chrysler Motors Corp. v. Thomas Auto Co.*, 939 F.2d 538, 540 (8th Cir. 1991); *Hicks v. NLO, Inc.*, 825 F.2d 118, 120 (6th Cir. 1987); *United States v. Rent-a-Homes Sys. of Ill., Inc.*, 602 F.2d 795, 797 (7th Cir. 1979).

See Pet. App. 11a n.3 (noting only that Baker had unsuccessfully filed a 23(f) petition). In his 23(f) petition, Baker, by necessity, argued that an order striking class allegations was appealable under Rule 23(f) because it had the same effect as a denial of class certification. The court of appeals, however, denied the petition without commenting on whether Rule 23(f) applies to orders striking class allegations. *Baker v. Microsoft Corp.*, No. 12-80085 (9th Cir. June 12, 2012) (denying the petition "in its discretion," without further comment). Only one circuit appears to have addressed this issue, holding in a footnote that Rule 23(f) does apply to such orders. *See Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 110 n.2 (4th Cir. 2013) (noting, however, that the question had not been contested).[2]

This Court has not answered the question. Nor is it necessary for the Court to answer it, given the dearth of authority on the question and the infrequency with which it arises. In fact, the Court would have to depart from its normal practice before deciding the scope of Rule 23(f), since the court below did not explicitly decide it. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012) ("Ordinarily, we do not decide in the first instance issues not decided below." (citation and internal

---

[2] In addition, the Seventh Circuit has held that Rule 23(f) allowed it to assert jurisdiction over a decision granting a motion to strike a defense. *See In re Bemis Co.*, 279 F.3d 419, 421 (7th Cir. 2002).

quotation marks omitted)). The arguments that Microsoft makes would be better decided in a case involving a denial of class certification—a context to which Rule 23(f) undoubtedly applies.

3. Microsoft does not identify a circuit split on whether named plaintiffs may voluntarily dismiss their individual claims to appeal a decision striking class claims. This should not be surprising. Pre-answer motions to strike class allegations are exceptionally rare, for generally "the pleadings alone will not resolve the question of class certification," and "some discovery will be warranted." *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 942 (9th Cir. 2009) (reviewing the grant of a motion to "deny class certification" under Rule 23(f)). This Court need not make room on its docket to review a procedurally unusual issue on which the circuits have not split.

4. Microsoft also contends that "[t]he jurisdictional issue is outcome-determinative here," Pet. 19, but that contention is incorrect—largely due to this case's unusual procedural posture. Because Baker appealed the district court's order striking class claims, rather than a denial of class certification, the opinion below was necessarily limited in scope. The court of appeals was careful to withhold any "opinion on whether" the case is "amenable to adjudication by way of a class action, or whether plaintiffs should prevail on a motion for class certification if such a motion is filed." Pet. App. 19a. It merely held that the district court erred when it determined that Baker

was precluded as a matter of law from asserting class claims. *Id.* at 18a-19a.

II. The circuit split is illusory.

Microsoft urges review to resolve what it characterizes as a "firmly entrenched" circuit split over the question presented. Pet. 13. As an initial matter, the putative split does not affect this case. None of the cases Microsoft cites addressed whether named plaintiffs could voluntarily dismiss their individual claims to appeal a decision striking class allegations from a complaint. For that reason alone, the circuit split, even if it existed, would not warrant certiorari here. But the supposed circuit split is also illusory.

Contrary to Microsoft's insistence, the Tenth Circuit is in harmony with the Ninth Circuit. The Tenth Circuit has held that named plaintiffs may not appeal a denial of class certification after the district court has dismissed their individual claims for failure to prosecute. *Bowe v. First of Denver Mortg. Investors*, 613 F.2d 798, 800-01 (10th Cir. 1980). *Bowe* relied on—and agreed with—the Ninth Circuit's identical holding in *Huey v. Teledyne, Inc.*, 608 F.2d 1234 (9th Cir. 1979). *Huey* remains good law in the Ninth Circuit, Pet. App. 12a n.4, and also makes good sense, since appellants should not be able to profit by their failure to prosecute diligently. While Microsoft asserts that, unlike the *Huey* plaintiffs, the plaintiffs in *Bowe* were not "dilatory," Pet. 12 n.2, nothing in the Tenth Circuit's opinion supports that assertion. In any

event, the Tenth Circuit has not yet addressed whether it has jurisdiction to review a denial of class certification after a voluntary dismissal—which counsels in favor of further percolation in the courts of appeals rather than immediate review.

While the Second Circuit, unlike the Ninth and Tenth, has allowed a named plaintiff to appeal after the district court has dismissed its individual claim for lack of prosecution, *Gary Plastics Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 178-79 (2d Cir. 1990), that disagreement is irrelevant to the present petition. Baker's individual claims were not dismissed for failure to prosecute. Indeed, that was precisely the basis on which the court of appeals distinguished this case from its earlier decision in *Huey*. Pet. App. 12a n.4. Accordingly, this case cannot be a vehicle for resolving any circuit conflict on whether a dismissal for failure to prosecute gives the courts of appeals jurisdiction to review a preceding interlocutory decision.

Microsoft also cites the Eleventh Circuit to support an alleged circuit split, but that court has not yet addressed the question presented. In *Druhan v. American Mutual Life*, 166 F.3d 1324 (11th Cir. 1999), the appellant was not challenging a denial of class certification. Moreover, later cases have limited *Druhan*'s statements on whether a court of appeals has jurisdiction to review a final judgment that is produced by a voluntary dismissal. *See id.* at 1325-26. Since *Druhan*, the Eleventh Circuit has held that plaintiffs may indeed challenge certain interlocutory

orders through a voluntary dismissal. *See OFS Fitel, LLC v. Epstein, Becker & Green, P.C.*, 549 F.3d 1344, 1357 (11th Cir. 2008). The court has not yet had an opportunity to address whether a denial of class certification is one of the interlocutory orders that plaintiffs may challenge by voluntary dismissal and subsequent appeal. Because the Eleventh Circuit has not yet addressed the question presented, immediate review of that question would be premature.

Nor has the Third Circuit squarely addressed the question presented. It has held that plaintiffs may not voluntarily dismiss their claims to challenge decertification in a collective action under the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 245-46 (3d Cir. 2013), but it has not addressed the question Microsoft asks the Court to decide.[3] Collective actions under the FLSA and class certification under Rule 23 are "fundamentally different." *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1529 (2013). In particular, the relationship between the class claims and the named plaintiffs' individual claims is different. In FLSA collective actions, the mooting of the

---

[3] In *Camesi*, the court of appeals relied on *Sullivan v. Pacific Indemnity Co.*, 566 F.2d 444 (3d Cir. 1977), an earlier case in which the court had dismissed an appeal seeking to challenge a denial of class certification. In *Sullivan*, however, the named plaintiffs had not voluntarily dismissed their claims, but instead, as in the Second Circuit's *Gary Plastics* case, had their case dismissed for failure to prosecute. *See Camesi*, 729 F.3d at 245.

named plaintiff's claim moots the case and deprives the federal courts of jurisdiction. *Id.* That is not necessarily the case under Rule 23. *See id.* at 1530. Hence, a voluntary dismissal in an FLSA case presents an analytically different jurisdictional issue from a voluntary dismissal in a proposed class action under Rule 23. Because the Third Circuit has not yet addressed the latter question, review of that question is not yet warranted.

The Fourth Circuit has held that plaintiffs who voluntarily dismissed their individual claims lacked Article III standing to challenge a denial of class certification, but that holding raises a different question from the one that Microsoft presents in its petition. *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 98-100 (4th Cir. 2011). Microsoft does not argue that Baker's voluntary dismissal deprived the federal courts of jurisdiction under Article III. Its only argument is that the court of appeals lacked appellate jurisdiction under 28 U.S.C. § 1291. Pet. 20-23.[4]

That leaves the Seventh Circuit's decision in *Chavez v. Illinois State Police*, 251 F.3d 612 (7th Cir. 2001). There, the court of appeals said it would "not

---

[4] While Microsoft argues that Baker's claims would be moot if they were not revived by the court of appeals' decision, Pet. 22-23, those claims *were* revived by the decision below. The court of appeals' past decisions establish that when plaintiffs voluntarily dismiss their claims with prejudice to challenge an earlier decision, a reversal of that decision will revive the claims. *See Concha v. London*, 62 F.3d 1493, 1507-08 (9th Cir. 1995).

review" a denial of class certification because the plaintiffs had voluntarily dismissed their individual claims. *Id.* at 629. Because the Seventh Circuit failed to provide any explanation or analysis for this decision, it is unclear why it declined review. It is not even clear that the Seventh Circuit's decision to decline review was jurisdictional rather than merely prudential. Because one cannot know what the Seventh Circuit decided and why it decided it, *Chavez* provides a slender reed for a grant of certiorari. Indeed, its lack of analysis just underscores the need for additional consideration by the lower appellate courts before the Court grants certiorari. Review of the question presented must await not merely a suitable vehicle, but also a genuine conflict in appellate authority.

III. The decision below is correct.

The court of appeals' decision hewed to the fundamentals of appellate jurisdiction. Microsoft's arguments to the contrary are incorrect.

1. The regional courts of appeals have "jurisdiction of appeals from all final decisions of the district courts." 28 U.S.C. § 1291. A final decision is "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945).

The district court's judgment here satisfied the statutory finality requirement. The district court had already dismissed the class claims by striking Baker's

class allegations from the complaint. By dismissing all of Baker's individual claims with prejudice, Pet. App. 36a-37a, the judgment disposed of all remaining claims and hence disposed "of the whole case." *Catlin*, 324 U.S. at 233; *see Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 86 (2000) (holding that the dismissal of all claims with prejudice was a final decision). Contrast this with *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), where the named plaintiffs had not secured a final judgment of all claims before appealing the district court's decertification decision.

Because the judgment was final, the only possible argument against appellate jurisdiction would be that Baker's voluntary dismissal somehow deprived the court of appeals of jurisdiction. Microsoft does not make this argument, however—perhaps because it would have no basis in the text of 28 U.S.C. § 1291, which requires only finality. And, in any event, the ruling that Baker challenged on appeal—the decision to strike class claims—was entered over his objection. The court of appeals therefore gained jurisdiction to review that decision through the subsequent final judgment. *See United States v. Procter & Gamble Co.*, 356 U.S. 677, 680-81 (1958) (voluntary dismissal of complaint did not strip court of appeals of jurisdiction to review an earlier decision to which the appellant had objected).

2. Microsoft appears to argue, however, that the motivation behind Baker's voluntary dismissal stripped the court of appeals of jurisdiction. Microsoft

surmises that Baker voluntarily dismissed his individual claims because the order striking his class claims deprived him of an economic incentive for further litigation. Because that motivation lay behind the voluntary dismissal, Microsoft argues, the court of appeals lacked jurisdiction. Pet. 20-21.

It is this argument, and not the court of appeals' decision, that conflicts with *Livesay*. There, the named plaintiffs had tried to appeal a denial of class certification without proceeding to final judgment. This Court held that a court of appeals did not have jurisdiction over that otherwise interlocutory decision simply because it deprived the plaintiffs of motivation to pursue their individual claims. *See* 437 U.S. at 470-72. *Livesay* makes the named plaintiffs' motivations irrelevant to appellate jurisdiction. Microsoft's attempt to make those motivations relevant conflicts with *Livesay*. Just as subjective motivations cannot bestow finality on an otherwise interlocutory order, so they cannot strip finality from an otherwise final order.

Indeed, subjective motivations cannot alter finality for the very reason this Court identified in *Livesay*: Inquiring into the appellant's motivation would waste judicial resources. *Id.* at 473. The inherent complexity of ascertaining motive threatens the "operational consistency and predictability" that stand at the core of the final-judgment rule. *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs & Participating Emps.*, 134 S. Ct. 773, 780 (2014). Even more fundamentally,

Microsoft's focus on subjective motivations introduces uncertainty and complexity into a threshold issue—jurisdiction—where "administrative simplicity is a major virtue." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

Microsoft's novel test will also require going beyond the four corners of the final decision, and delving into the record, just to determine the threshold question of jurisdiction. This Court has previously rejected a proposed test for finality that required rummaging into details beyond the four corners of a district court order. *See Ray Haluch Gravel*, 134 S. Ct. at 781 (rejecting a rule that would have required the appellate court to consult an affidavit accompanying a motion in order to discern finality). To promote predictability and uniformity, a district court order's finality must depend on the order itself. Microsoft's novel and "[c]omplex jurisdictional test[ ]," therefore, must be rejected. *Hertz*, 559 U.S. at 94.

3. Microsoft raises a number of other miscellaneous arguments against the court of appeals' decision. Each fails.

First, it argues that the decision allows parties to circumvent the restrictions that Rule 23(f) puts on interlocutory appeals of class-certification decisions. But Rule 23(f) allows an appeal from a class-certification decision without a final judgment on the merits. Here, there was a final judgment on the

merits following entry of an adverse order striking the class allegations.[5]

This distinction matters. If Baker had failed to convince the court of appeals to reverse the district court's striking of the class claims, he would have lost his individual claims permanently. When plaintiffs voluntarily dismiss claims to appeal an earlier ruling, but fail to overturn that ruling, the voluntarily dismissed claims are extinguished. *See Concha v. London*, 62 F.3d 1493, 1507-08 (9th Cir. 1995). By contrast, if Baker had secured an appeal under Rule 23(f) before final judgment and had lost that appeal, his individual claims would have still been live. Unlike a Rule 23(f) appellant, Baker ran "a serious risk of losing his claim[s] entirely." *Id.* at 1508. It is this risk that makes the judgment here "final." *See Cobbledick v. United States*, 309 U.S. 323, 325 (1940) (the purpose of the finality requirement is to avoid "piecemeal disposition" of the basic controversy in a single case).

If Microsoft is arguing that the existence of Rule 23(f) deprived the court of appeals of jurisdiction over an otherwise final judgment, that argument makes little sense. The possibility of interlocutory appeal cannot deprive a final judgment of finality. If it did, the availability of an interlocutory appeal under 28

---

[5] Baker assumes for purposes of the present discussion that appellate jurisdiction under Rule 23(f) extends to decisions striking class allegations. *See supra* 10-12.

U.S.C. § 1292(b) would deprive the courts of appeals of jurisdiction over all final decisions. Section 1292(b), after all, allows an appeal from *any* interlocutory order, not just an order on class certification. Yet no one thinks that § 1292(b) deprives appellants of the ability to challenge those interlocutory orders on appeal after a final judgment. Likewise here, Rule 23(f) does not deprive appellants of the ability to challenge a class-certification decision after a final judgment, let alone an order striking class claims.

Next, Microsoft contends that the court of appeals' decision gave Baker an unfair advantage by allowing him to seek immediate review. Pet. 15, 22. But this is no more unfair than any individual plaintiff's voluntary dismissal of his remaining claims following a district court's partial dismissal—a voluntary dismissal that then allows immediate review of the earlier involuntary dismissal. *See supra* 9-10. Nor was Baker's voluntary dismissal costless. To the contrary, by voluntarily dismissing his claims, he ran "a serious risk of losing his claim[s] entirely" by failing to secure a reversal. *Concha*, 62 F.3d at 1508.

Finally, Microsoft, pointing to the limited scope of the court of appeals' decision, worries that allowing an appeal from a voluntary final judgment may allow for serial appeals. Pet. 15, 22. Here, however, the limited scope of the court of appeals' decision flowed from Microsoft's own strategic decision to seek to dismiss the class claims as a matter of law before answering the complaint. The preliminary nature of the court of appeals' decision differs little from any

appellate decision in which a district court has wrongly interpreted the law at an early stage and on a dispositive issue. And, rather than receive that appellate opinion much later, Baker promoted judicial economy by voluntarily dismissing the remaining claims and appealing the district court's decision immediately.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted this December 14, 2015.

DARREN T. KAPLAN
Counsel of Record
STUEVE SIEGEL HANSON LLP
1359 Broadway, Suite 2001
New York, NY 10018
(212) 999-7370

ROBERT L. ESENSTEN
ESENSTEN LAW
12100 Wilshire Blvd.,
Suite 1660
Los Angeles, CA 90025
(310)-273-3090

JEFFREY M. OSTROW
JONATHAN M. STREISFELD
KOPELOWITZ OSTROW
FERGUSON WEISELBERG
GILBERT P.A.
One West Las Olas Blvd.,
Suite 500
Fort Lauderdale, FL 33301
(954) 525-4100

MARK A. GRIFFIN
AMY WILLIAMS-DERRY
BENJAMIN GOULD
KELLER ROHRBACK L.L.P.
1201 Third Avenue,
Suite 3200
Seattle, WA 98101
(206) 623-1900

PAUL L. STRITMATTER
BRADLEY J. MOORE
STRITMATTER KESSLER
WHELAN KOEHLER
MOORE KAHLER
200 Second Avenue West
Seattle, WA 98119
(206) 448-1777

RECORD
T AL
BRIEF

No. 15-457

Supreme Court, U.S.
FILED
DEC 22 2015
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

MICROSOFT CORPORATION,
Petitioner,

v.

SETH BAKER, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

Bradford L. Smith
David M. Howard
Timothy G. Fielden
Microsoft Corporation
One Microsoft Way
Redmond, WA 98052

Charles B. Casper
Montgomery, McCracken
Walker & Rhoads, LLP
123 South Broad Street
Philadelphia, PA 19109

Jeffrey L. Fisher
559 Nathan Abbott Way
Stanford, CA 94305

Stephen M. Rummage
Counsel of Record
Fred B. Burnside
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101
(206) 622-3150
steverummage@dwt.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

REPLY BRIEF FOR PETITIONER.....1

CONCLUSION.....11

TABLE OF AUTHORITIES

Cases

Baker v. Microsoft Corp.,
851 F. Supp. 2d 1274 (W.D. Wash. 2012) 7

Berger v. Home Depot USA, Inc.,
741 F.3d 1061 (9th Cir. 2014) 2, 6

Bobbitt v. Milberg LLP,
801 F.3d 1066 (9th Cir. 2015), *pet. for cert. filed* (No. 15-734) 6, 11

Bowe v. First of Denver Mortgage Investors,
613 F.2d 798 (10th Cir. 1980) 2, 10

Camesi v. Univ. of Pittsburgh Med. Ctr.,
729 F.3d 239 (3d Cir. 2013) 2, 3, 10

Chavez v. Illinois State Police,
251 F.3d 612 (7th Cir. 2001) 3, 4

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) ..... *passim*

Druhan v. Am. Mut. Life,
166 F.3d 1324 (11th Cir. 1999) 5, 9

Gardner v. Westinghouse Broad. Co.,
437 U.S. 478 (1978) 6, 7

Himler v. Comprehensive Care Corp.,
992 F.2d 1537 (4th Cir. 1993)
(unpublished opinion) 4

Huey v. Teledyne, Inc.,
608 F.2d 1234 (9th Cir. 1979) 2

Moore v. Charlotte-Mecklenburg Bd. of Ed.,
402 U.S. 47 (1971) (per curiam) 9

OFS Fitel, LLC v. Epstein, Becker & Green, P.C.,
549 F.3d 1344 (11th Cir. 2008) 5, 9

Rhodes v. E.I. du Pont de Nemours & Co.,
636 F.3d 88 (4th Cir. 2011) 4

Scott v. Family Dollar Stores, Inc.,
733 F.3d 105 (4th Cir. 2012) 8

Sullivan v. Pac. Indem. Co.,
566 F.2d 444 (3d Cir. 1977) 3

U.S. Parole Comm'n v. Geraghty,
445 U.S. 388 (1980) 7

United Airlines v. McDonald,
432 U.S. 385 (1977) 1, 7

United States v. Procter & Gamble Co.,
356 U.S. 677 (1958) 5, 9, 10

Statutes

28 U.S.C. § 1291 ..... 4, 10

28 U.S.C. § 1292(b) 8

Rules

Fed. R. Civ. P. 23 3

Fed. R. Civ. P. 23(f) 6, 8

Constitutional Provisions

U.S. CONST. art. III 4, 5

Other Authorities

MCLAUGHLIN, JOSEPH M., MCLAUGHLIN ON CLASS ACTIONS § 7.1 (12th ed. 2015) 1, 2

REPLY BRIEF FOR PETITIONER

Faced with a split in the circuits and a position on the merits at odds with this Court's precedent, respondents resort mostly to vehicle arguments. Most prominently, respondents suggest an order striking class allegations might somehow trigger different appellate considerations than an order denying a motion to certify a class. But they said exactly the opposite below, and they were right the first time. There is no relevant difference between the two types of orders; both deny the named plaintiffs' request (either in their complaint or in a motion) to represent a class, leaving plaintiffs free to pursue their individual claims.

This case, therefore, raises exactly the question Microsoft says it does: whether a court of appeals has jurisdiction to review an order "denying class certification" after the named plaintiffs voluntarily dismiss their claims with prejudice. Pet. i; *compare United Airlines v. McDonald*, 432 U.S. 385, 387-93 (1977) (repeatedly characterizing order striking class allegations as a "denial of class certification"). As the four amicus briefs supporting the petition confirm, there is a pressing need for this Court to resolve that question and to require the Ninth and Second Circuits to abide by the appellate restrictions in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

1. A leading treatise recently verified that the circuits are split over whether plaintiffs who voluntarily dismiss their claims may appeal orders denying class certification. *See* 2 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 7.1 (12th ed. 2015) (text accompanying notes 51-55). Respondents quibble with this reality, but in vain.

Respondents first assert that the Tenth Circuit's holding in *Bowe v. First of Denver Mortgage Investors*, 613 F.2d 798 (10th Cir. 1980), does not necessarily apply to "a voluntary dismissal" such as the one here because *Bowe* technically arose from a dismissal for refusal to prosecute. BIO 13-14. Respondents are incorrect. The *Bowe* court reasoned that *Livesay* forbids plaintiffs from "establish[ing] an inability to proceed without class certification" to manufacture an appealable order. 613 F.2d at 800. This prohibition applies equally to requests for voluntary dismissals – as treatises confirm. *See* 2 McLaughlin, *supra*, § 7.1 (note 53); Pet. 9 (citing other sources). That the Ninth Circuit – in contrast to every other court to address the question – distinguishes between the means by which plaintiffs secure dismissals only highlights the infirmities of the decision below. It does nothing to undercut the clarity of the Tenth Circuit's position.[1]

Respondents next note that the Third Circuit's holding in *Camesi v. Univ. of Pittsburgh Med. Ctr.*,

---

[1] The Ninth Circuit itself originally equated voluntary dismissals with dismissals for refusal to prosecute when assessing the appealability of an order denying class certification. *See Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1065-66 (9th Cir. 2014) (quoting with approval the Wright & Miller treatise's recitation of the Second Circuit's holding in *Gary Plastic Packaging Corp. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176 (2d Cir. 1990), that dismissals for refusal to prosecute create right to appeal). It was only when Microsoft pointed out here that the circuit had previously held in *Huey v. Teledyne, Inc.*, 608 F.2d 1234 (9th Cir. 1979), that a dismissal for failure to prosecute could *not* create appellate jurisdiction over an order denying class certification that the Ninth Circuit suggested a difference between the two types of plaintiff-initiated dismissals. *See* Pet. App. 12a n.4.

729 F.3d 239 (3d Cir. 2013), arose in the context of a collective action under the Fair Labor Standards Act (FLSA) rather than under Rule 23. That is significant, respondents contend, because "[i]n FLSA collective actions, the mooting of the named plaintiff's claim moots the case," whereas "[t]hat is not necessarily the case under Rule 23." BIO 15. But this observation about mootness, even if accurate, has nothing to do with respondents' jurisdictional theory or Third Circuit law on the jurisdictional issue here. Respondents argue their claims are *not* moot because the Ninth Circuit "revived" them. Pet. 16 n.4. And the Third Circuit holds it lacks jurisdiction when named plaintiffs voluntarily dismiss their claims not because the dismissals moot the claims, but because they "constitute impermissible attempts to manufacture finality." *Camesi*, 729 F.3d at 245. Therefore, attempting to appeal a voluntary dismissal in a FLSA collective action is no different in the Third Circuit from attempting the same maneuver in "a class action [brought] under Rule 23." *Id.*; *see also Sullivan v. Pac. Indem. Co.*, 566 F.2d 444, 445 (3d Cir. 1977) (barring "strategy" of generating dismissal to avoid the rule "against interlocutory appeals of class certification determinations" under Rule 23).

Respondents contend it is "unclear" whether the Seventh Circuit's refusal in *Chavez v. Illinois State Police*, 251 F.3d 612 (7th Cir. 2001), to review a denial of class certification in the posture here "was jurisdictional rather than merely prudential." BIO 17. Respondents are wrong again. In a section entitled "Jurisdiction," the Seventh Circuit explained it could "not review claims that were dismissed pursuant to plaintiffs' request for voluntary

dismissal with prejudice" because plaintiffs cannot "manufacture[] *appellate jurisdiction* by asking the district court to voluntarily dismiss their claims." *Chavez*, 251 F.3d at 628 (emphasis added); *see also id.* at 629 (reiterating this holding).

Turning to *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88 (4th Cir. 2011), respondents try to push aside the Fourth Circuit's holding on the ground that it invoked Article III, instead of 28 U.S.C. § 1291, to reject the voluntary dismissal tactic. BIO 16. But whatever the basis of the Fourth Circuit's holding, the fact remains that Fourth Circuit law precludes appellate jurisdiction under the precise circumstances here, while the Second and Ninth Circuits claim the power to decide such appeals. In any event, the Fourth Circuit has held that the voluntary dismissal tactic violates *both* Article III and Section 1291. When plaintiffs claim a reversal after a voluntary dismissal would allow them to proceed based on some residual "representative interest" in other class members' claims, then Article III bars the appeal. *Rhodes*, 636 F.3d at 99-100. But to the extent plaintiffs claim such a reversal would revive their own claims, then Section 1291 bars the appeal. *See Himler v. Comprehensive Care Corp.*, 992 F.2d 1537 (4th Cir. 1993) (unpublished opinion). Microsoft makes both arguments here as well. *See* Pet. i (asking simply whether "jurisdiction" exists); Pet. 22-23 (elaborating Article III argument).

Finally, respondents argue the Eleventh Circuit might tolerate the voluntary dismissal tactic because it has not yet directly addressed whether a voluntary dismissal can support an appeal of "a denial of class

certification," and the Eleventh Circuit held in *OFS Fitel, LLC v. Epstein, Becker & Green, P.C.*, 549 F.3d 1344 (11th Cir. 2008), that "plaintiffs may indeed challenge certain interlocutory orders through a voluntary dismissal." BIO 14-15. But the Eleventh Circuit has left no doubt about what its precedent dictates in the circumstances here. In *OFS Fitel*, the Eleventh Circuit held that plaintiffs may dismiss their claims to appeal orders that are "effectively case-dispositive" – that is, orders effectively foreclosing their ability to prove their claims "on the merits." *OFS Fitel*, 549 F.3d at 1358; *see also United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958) (same). By contrast, when "there is no contested court ruling, either interlocutory or final, as to the merits of the plaintiff's claims," the rule of *Druhan v. Am. Mut. Life*, 166 F.3d 1324 (11th Cir. 1999), controls. *OFS Fitel*, 549 F.3d at 1356. Under *Druhan*, appellate jurisdiction is lacking when "[t]he dismissal with prejudice was requested only as a means of establishing finality in the case such that the plaintiff could appeal [an] interlocutory order." *Druhan*, 166 F.3d at 1326.

Orders denying class certification fall squarely on *Druhan*'s side of this dichotomy. Orders involving class certification "in no way touch[] on the merits of the claim but only relate[] to pretrial procedures" – namely, whether plaintiffs may join their claims with other would-be litigants. *Gardner v. Westinghouse Broad. Co.*, 437 U.S. 478, 482 (1978) (quotation marks and citation omitted). Thus, even though *Druhan* was not a class action, Eleventh Circuit law precludes appellate jurisdiction under the circumstances here.

2. Respondents contend for two reasons that this case is an unsuitable vehicle for resolving the conflict over the legitimacy of the voluntary dismissal tactic. Neither contention has merit.

a. When they sought interlocutory review of the district court's order striking their class allegations, respondents explained that "[b]ecause that decision foreclosed the possibility of class certification, it is *functionally equivalent* to a decision on class certification." Pet. for Permission Appeal Under Fed. R. Civ. P. 23(f) at 5 (emphasis added). And when the Ninth Circuit held in *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1064-66 (9th Cir. 2014), that plaintiffs may appeal orders denying class certification after voluntarily dismissing their claims, respondents told the Ninth Circuit that "*Berger* is *indistinguishable* from this case." Pltfs.' Letter Submitting Supp. Authority (Feb. 14, 2014), at 1 (emphasis added). The Ninth Circuit agreed. Pet. App. 11a-12a; *see also Bobbitt v. Milberg LLP*, 801 F.3d 1066, 1069 (9th Cir. 2015) (applying the holding below and *Berger* to assume jurisdiction over an order denying a motion to certify a class), *pet. for cert. filed* (No. 15-734).

Nevertheless, respondents now argue that orders striking class allegations "differ[] significantly" from orders denying motions to certify classes. Unlike an order denying a motion to certify a class, respondents contend, an order striking class allegations is "analogous" to an order "dispos[ing] of less than all claims," such as an order dismissing a negligence claim while allowing a strict liability claim to proceed. BIO 9-10.

Respondents are wrong. "A plaintiff who brings a class action presents two separate issues for judicial resolution. One is the claim on the merits; the other is the claim that he is entitled to represent a class." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 402 (1980). An order denying a motion to certify a class "d[oes] not affect the merits of petitioner's own claim." *Gardner*, 437 U.S. at 480-81. "An order refusing to certify . . . a class" therefore leaves a plaintiff "free to proceed on his individual claim," without prejudicing his ability to obtain a judgment on the merits. *Livesay*, 437 U.S. at 467.

An order striking class allegations is likewise a "denial of class certification," while leaving plaintiffs entirely free to "proceed . . . on an individual basis." *McDonald*, 432 U.S. at 390, 391 & n.4. This case illustrates that reality. Respondents' complaint alleged eleven substantive causes of action. The complaint separately alleged that a class action was proper and asked the district court to "certify a class action" and to "appoint the named Plaintiffs to serve as Class Representatives." Am. Compl. at 43. While the district court's order turned down respondents' request to certify a class action, it left them free to pursue all eleven of their claims on the merits. *See Baker v. Microsoft Corp.*, 851 F. Supp. 2d 1274 (W.D. Wash. 2012). The order is thus identical for purposes of the question presented to an order denying a motion to certify a class.

Respondents also suggest that Rule 23(f) might not apply to orders striking class allegations the same way it applies to orders denying motions to certify classes. BIO 10-11. But the courts unanimously have held – as respondents stressed

when they filed their Rule 23(f) petition – that Rule 23(f) applies equally in both settings. This is because an order striking class allegations "is the functional equivalent of denying a motion to certify the case as a class action." *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 110 n.2 (4th Cir. 2012) (quoting *In re Bemis Co.*, 279 F.3d 419, 421 (7th Cir. 2002)).

At any rate, respondents overstate the significance of Rule 23(f) to Microsoft's argument on the merits. In *Livesay*, this Court explained that the "death knell" doctrine was illegitimate in part because it allowed plaintiffs to evade the restrictions on interlocutory review embedded in 28 U.S.C. § 1292(b). *See Livesay*, 437 U.S. at 474-75. Microsoft argues the voluntary dismissal tactic likewise allows plaintiffs to evade restrictions on interlocutory review. *See* Pet. 22. Microsoft maintains (as respondents did below) that the pertinent restrictions are now codified in Rule 23(f), which has in practice supplanted Section 1292(b) as to orders denying class certification. But if Microsoft and respondents are wrong that Rule 23(f) governs review of orders striking class allegations (as it governs review of orders denying motions for class certification), then Section 1292(b) would define the limits of appellate jurisdiction here. And Microsoft's argument would remain the same: The voluntary dismissal tactic, just like the "death knell" doctrine, impermissibly allows plaintiffs to evade the applicable restrictions on interlocutory review.

b. Respondents assert the question presented is not outcome-determinative because the Ninth Circuit "was careful to withhold any opinion on whether the case is amenable to adjudication by way of a class

action." BIO 12. This assertion misses the point. The question presented is outcome-determinative because if this Court holds that the voluntary dismissal tactic is illegitimate, then the case is over. *See* Pet. 19. The only relevance of the Ninth Circuit's refusal to decide whether class certification is appropriate is that it underscores the voluntary dismissal tactic's propensity to generate multiple piecemeal appeals. *See* Pet. 12-13.

3. Respondents' arguments on the merits only reinforce the need for review.

a. Respondents contend that in contrast to *Livesay*, they challenge a "final" judgment because the district court not only denied their request to certify a class but also dismissed their claims with prejudice, thereby putting them at "risk of los[ing] their claims" if they fail to secure a reversal. BIO 17-18, 21. But more than finality is needed to secure appellate jurisdiction. Appellants must also show "adversity." *Druhan*, 166 F.3d at 1326; *see also Moore v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 47, 47-48 (1971) (per curiam); *Procter & Gamble*, 356 U.S. at 680. And there is no adversity where a district court dismisses a case *at a plaintiff's request* without previously having entered any orders undercutting the plaintiff's claims "on their merits." *Camesi*, 729 F.3d at 246; *see also Procter & Gamble*, 356 U.S. at 680 (discussing "the familiar rule that a plaintiff who has voluntarily dismissed his complaint may not [appeal]" if the ruling precipitating the dismissal was not "on the merits"); *OFS Fitel*, 549 F.3d at 1356-57 (same).

The order of dismissal here occurred after a ruling having nothing to do with the merits of

respondents' claims. It cannot create appellate jurisdiction.

As a fall-back, respondents argue they are really appealing "the decision to strike class claims," and that order satisfies the adversity requirement because it was entered "over [their] objection." BIO 18. But this argument runs right back into *Livesay*'s holding that an order denying class certification (even if the "death knell" of the case) is interlocutory and not immediately appealable. 437 U.S. at 469, 477. That being so, a plaintiff may not circumvent *Livesay*'s rule by voluntarily dismissing their claims to provide a "graphic demonstration that the 'death knell' has indeed sounded." *Bowe*, 613 F.2d at 800. "If [courts] were to allow such a procedural sleight-of-hand to bring about finality," there would be "nothing to prevent [plaintiffs] from employing such a tactic to obtain review of discovery orders, evidentiary rulings, or any of the myriad decisions a district court makes before it reaches the merits" of class actions. *Camesi*, 729 F.3d at 245-46. "This would greatly undermine the policy against piecemeal litigation embodied by § 1291," *id.* at 246, and give plaintiffs an unfair advantage in putative class actions, *see* Pet. 15.

b. Respondents assert the danger of "serial appeals" here derives only from "Microsoft's own strategic decision" to challenge respondents' class allegations at the outset of the case as matter of law. BIO 22. Not so. As other Ninth Circuit cases show, plaintiffs' use of the voluntary dismissal tactic is just as likely to generate serial appeals when defendants delay challenging the propriety of the proposed class until discovery has taken place and the plaintiffs

have moved to certify a class. *See, e.g.*, *Bobbitt*, 801 F.3d at 1069, 1072 n.5.

c. Finally, respondents assert that a test for appellate jurisdiction should not turn on plaintiffs' "subjective motivations" – specifically, on whether plaintiffs voluntarily dismiss their claims because they deem them no longer economically viable. BIO 19. But nothing about Microsoft's argument depends on plaintiffs' motivations. The simple fact that respondents voluntarily dismissed their claims with prejudice in the absence of any order adversely affecting the merits of their claims foreclosed their ability to appeal. Genuine "death knell" situation or not, the court of appeals should have held that it lacked jurisdiction over this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Bradford L. Smith
David M. Howard
Timothy G. Fielden
Microsoft Corporation
One Microsoft Way
Redmond, WA 98052

Charles B. Casper
Montgomery, McCracken
Walker & Rhoads, LLP
123 South Broad Street
Philadelphia, PA 19109

Jeffrey L. Fisher
559 Nathan Abbott Way
Stanford, CA 94305

Stephen M. Rummage
Counsel of Record
Fred B. Burnside
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101
(206) 622-3150
steverummage@dwt.com

December 22, 2015

Supreme Court, U.S.
FILED
NOV 13 2015
OFFICE OF THE CLERK

No. 15-457

IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

v.

SETH BAKER, ET AL.,

Respondents.

On Petition For a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Kate Comerford Todd
Warren Postman
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062

Mark W. Mosier
Counsel of Record
Michael M. Maya
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
mmosier@cov.com
(202) 662-6000

Counsel for Amicus Curiae

Library of Congress

QUESTION PRESENTED

Whether a federal court of appeals has jurisdiction to review an order denying class certification after the named plaintiffs voluntarily dismiss their claims with prejudice.

TABLE OF CONTENTS

Page

QUESTION PRESENTED ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. The Ninth Circuit Has Distorted Class Action Practice by Providing Immediate Appellate Review of Class Certification Orders for Plaintiffs, But Not Defendants. 5

A. The Federal Rules Give Plaintiffs and Defendants the Same Right to Seek Immediate Appellate Review of Class Certification Orders. 6

B. The Ninth Circuit Has Effectively Revived the Death Knell Doctrine, Giving Plaintiffs an Unfair Advantage in Seeking Appellate Review. 9

II. This Case Presents an Ideal Vehicle to Resolve an Issue of Critical Importance to the Business Community. 13

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

Cases

AT&T Mobility LLC v. Concepcion,
131 S. Ct. 1740 (2011) 8

Berger v. Home Depot USA, Inc.,
741 F.3d 1061 (9th Cir. 2014) 14

Blair v. Equifax Check Servs., Inc.,
181 F.3d 832 (7th Cir. 1999) 9, 13

Butler v. Sears, Roebuck & Co.,
727 F.3d 796 (7th Cir. 2013) 2

Camesi v. Univ. of Pitt. Med. Ctr.,
729 F.3d 239 (3d Cir. 2013) 12

Chamberlan v. Ford Motor Co.,
402 F.3d 952 (9th Cir. 2005) 7

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) ..... *passim*

Genesis Healthcare Corp. v. Symczyk,
133 S. Ct. 1523 (2013) 10

U.S. Parole Comm'n v. Geraghty,
445 U.S. 388 (1980) 10

Statutes

28 U.S.C. § 1291 ..... 2, 3, 5

28 U.S.C. § 1292 3

Other Authorities

Fed. R. Civ. P. 23(f) ..... *passim*

John Beisner et al., *Study Reveals US Courts of Appeals Are Less Receptive to Reviewing Class Certification Rulings* (Apr. 29, 2014), http://bit.ly/1GNGoI5 ..... 7, 9

Robert J. Herrington, *The Numbers Game:* Dukes *and* Concepcion (Nov. 20, 2012), http://bit.ly/1L0S9pI 14

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.[1] A central function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts, including this Court. To that end, the Chamber regularly files amicus briefs in cases that raise issues of vital concern to the nation's business community.

The Chamber regularly files amicus briefs in this Court, including in cases involving important issues of class action practice and procedure. *See, e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146 (filed Aug. 14, 2015); *Campbell-Ewald Co. v. Gomez*, No. 14-857 (filed July 23, 2015); *Spokeo, Inc. v. Robins*, No. 13-1339 (filed July 9, 2015).

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for a party authored the brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than the *amicus*, its counsel, or its members made such a monetary contribution. Counsel for all parties received notice at least 10 days before the due date of *amicus*'s intention to file this brief. Respondents' letter consenting to the filing of this brief has been filed with the Clerk. Petitioner has given blanket consent to the filing of *amicus* briefs in support of either party.

Businesses are regularly named as defendants in class actions. The Chamber and its members therefore have a strong interest in ensuring that the courts correctly apply the federal law governing class actions. By failing to do that here, the Ninth Circuit has allowed class-action plaintiffs to take immediate appeals of orders denying class certification even in cases where the requirements for interlocutory appeal under Federal Rule of Civil Procedure 23(f) have not been met. The Chamber and its members have an interest in seeing this practice end.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs in putative class actions have long urged federal courts to allow immediate appeals of orders denying class certification. Plaintiffs contend that an immediate appeal is necessary because "only a lunatic or a fanatic" will litigate a claim seeking a few hundred dollars (or less) if that claim cannot be tried on a classwide basis. *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013). Accepting this argument, several courts of appeals developed the "death knell" doctrine, which treated an order denying class certification as a final judgment—and thus immediately appealable as of right under 28 U.S.C. § 1291—whenever the order made it "economically imprudent" for the plaintiff to litigate his or her individual claims. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 466 (1978).

This Court put an end to that practice in *Livesay*. Reaffirming the principle that appellate review of interlocutory orders typically must wait until after

final judgment, the Court unanimously held that an order denying class certification is not immediately appealable under § 1291 even if the order sounds the death knell for the plaintiffs' claims. *Id.*[2] The Court noted that adopting the death knell doctrine would lead to piecemeal appeals and thus waste judicial resources. *Id.* The Court also criticized the doctrine for "operat[ing] only in favor of plaintiffs," even though obtaining immediate appellate review of class certification orders "will often be of critical importance to defendants as well." *Id.* at 476.

This case involves an attempt to do what *Livesay* held cannot be done: obtain an immediate appeal as of right under § 1291 of an order denying class certification. Rather than invoking the discredited death knell doctrine, plaintiffs here voluntarily dismissed their claims following the district court's decision striking their class action allegations, and then immediately appealed the district court's order under § 1291. App. 10a.

Had the plaintiffs done this in the Third, Fourth, Seventh, Tenth, or Eleventh Circuits, their appeal would have been dismissed without any appellate review of the class certification order. *See* Pet. at 9-11 (collecting cases). But in the Second and Ninth Circuits, this tactic may be used to generate an immediate appeal of an order denying class

---

[2] The Court noted one express exception to this rule: Parties can seek an interlocutory appeal of a class certification order under § 1292(b). *See Livesay*, 437 U.S. at 475. Importantly, a § 1292(b) appeal cannot be taken as of right, but is left to the discretion of both the district court and the court of appeals. *Id.*

certification. In this case, the Ninth Circuit not only exercised jurisdiction under § 1291 based on the voluntary dismissal, but it also reversed the order striking the class action allegations and remanded the case for further proceedings. App. 19a.

I. The Federal Rules of Civil Procedure allow for immediate appeal of a class certification order only in limited circumstances and only at the discretion of the court of appeals. Importantly, the rules apply equally to plaintiffs and defendants because all parties have an interest in seeking immediate review of class certification orders. The Ninth Circuit's voluntary dismissal rule—like the death knell doctrine before it—upsets the balance struck by the federal rules. In *Livesay*, this Court rejected the death knell doctrine because it wasted judicial resources and did not apply equally to all parties. The voluntary dismissal rule has the same flaws and should be similarly rejected.

II. The question presented is exceptionally important. Defendants have always faced substantial pressure to settle cases in which a class is certified, and that pressure has only increased as more plaintiffs seek certification of nationwide classes. That the Ninth Circuit permits plaintiffs to seek immediate review of class certification denials makes the issue even more important because a disproportionate number of class actions are filed in California. This case is an ideal vehicle for resolving the circuit split because the question is squarely presented, the parties have fully litigated the issue, and it is outcome determinative.

The Court should grant the petition to resolve the circuit split and reaffirm *Livesay*'s holding that a plaintiff may appeal an order denying class certification as of right under § 1291 only after final judgment is entered following litigation of the claims on the merits.

ARGUMENT

I. The Ninth Circuit Has Distorted Class Action Practice by Providing Immediate Appellate Review of Class Certification Orders for Plaintiffs, But Not Defendants.

Federal law expressly provides a method for parties to seek immediate appellate review of a class certification order. *See* Fed. R. Civ. P. 23(f). Under Rule 23(f), a party can petition for interlocutory review of the order, and the court of appeals has discretion to take the appeal and review the class certification order prior to final judgment. *Id.* Importantly, Rule 23(f) applies to orders both granting and denying class certification, and thus the rule makes appellate review available on the same terms to both plaintiffs and defendants.

The Second and Ninth Circuits allow an additional method for obtaining immediate appellate review. These courts permit a plaintiff to forgo litigating his or her claims on the merits and to take an immediate appeal of an order denying class certification by voluntarily dismissing the claims with prejudice and then appealing under § 1291. Unlike an appeal under Rule 23(f), the court of appeals has no discretion to decline jurisdiction over the appeal. And because this tactic depends on dismissing the

claims—something a defendant cannot do—this method for obtaining immediate appellate review is available only to plaintiffs. By permitting this practice, the Second and Ninth Circuits have effectively revived the death knell doctrine and have given plaintiffs an unfair advantage in obtaining appellate review of class certification orders.

A. The Federal Rules Give Plaintiffs and Defendants the Same Right to Seek Immediate Appellate Review of Class Certification Orders.

The Federal Rules of Civil Procedure were amended in 1998 to provide for immediate appellate review of class certification orders in limited circumstances. *See* Fed. R. Civ. P. 23(f).[3] This new rule, Rule 23(f), was not intended to revive the death knell doctrine. Instead, the rule was designed to allow for appellate review only in limited cases and to do so in a way that avoided many of the problems created by the death knell doctrine.

The "principle vice" of the death knell doctrine was that it "authorize[d] indiscriminate interlocutory review of decisions made by the trial judge." *Livesay*, 437 U.S. at 474. This Court has long recognized that piecemeal appeals can have a "debilitating effect on judicial administration." *Id.* at 471 (internal quota-

---

[3] Rule 23(f) provides, in relevant part: "A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered." Fed. R. Civ. P. 23(f).

tion marks and citation omitted). Yet the death knell doctrine made piecemeal appeals more likely, because it allowed a plaintiff to appeal an order denying class certification before litigating her individual claims on the merits. *See id.* at 474.

Rule 23(f) minimizes the possibility of piecemeal appeals by making interlocutory appeals the exception, not the rule. Rather than creating a right to appeal all class certification orders, Rule 23(f) simply permits a party to petition for appellate review, and the court of appeals exercises discretion to decide whether to hear the case. Fed. R. Civ. P. 23(f). Courts have stated that "Rule 23(f) review should be a rare occurrence," because interlocutory appeals "are disruptive, time-consuming, and expensive." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 955, 959 (9th Cir. 2005). A recent study found that courts of appeals have granted less than a quarter of Rule 23(f) petitions.[4]

The death knell doctrine was also problematic because, in addition to allowing appeals as of right from all denials of class certification, it "operate[d] only in favor of plaintiffs." *Livesay*, 437 U.S. at 476. As the Court explained, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Id.* As a result, obtaining

---

[4] *See* John Beisner et al., *Study Reveals US Courts of Appeals Are Less Receptive to Reviewing Class Certification Rulings* (Apr. 29, 2014), http://bit.ly/1GNGoI5.

immediate appellate review of class certification orders "will often be of critical importance to defendants." *Id.*[5]

Rule 23(f) rectifies this imbalance by allowing both plaintiffs and defendants to petition for appellate review of class certification orders. Fed. R. Civ. P. 23(f). The Committee Note explains that the rule applies to all parties because all parties have an interest in seeking immediate appellate review:

> An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits on an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.

Fed. R. Civ. P. 23 Committee Note (1998).

Courts of appeals have treated plaintiffs and defendants similarly in applying Rule 23(f). As the Seventh Circuit has explained, "just as a denial of

---

[5] The Court recently reiterated that class actions present a significant "risk of 'in terrorem' settlements," because defendants "[f]aced with even a small chance of a devastating loss . . . will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011).

class status can doom the plaintiff, so a grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). A recent study found that Rule 23(f) petitions filed by plaintiffs and defendants are granted at roughly the same rate.[6]

In sum, Rule 23(f) allows for immediate appeal of class certification orders, but it does so without running into the problems created by the death knell doctrine. Rule 23(f) minimizes the risk of piecemeal appeals by making appellate review discretionary. And, unlike the death knell doctrine, Rule 23(f) provides a level playing field for both plaintiffs and defendants by allowing all parties to seek interlocutory review of class certification orders.

B. The Ninth Circuit Has Effectively Revived the Death Knell Doctrine, Giving Plaintiffs an Unfair Advantage in Seeking Appellate Review.

The Ninth Circuit's ruling in this case upsets the balance struck by Rule 23(f) and creates the same problems as the death knell doctrine. Plaintiffs in this case petitioned for interlocutory review under Rule 23(f), but the Ninth Circuit denied the petition. App. 10a. Yet, rather than litigating their claims on

---

[6] Courts of appeals have granted 20.5% of the petitions filed by plaintiffs, and 24.8% of the petitions filed by defendants. *See* John Beisner et al., *supra* n.4.

the merits before taking an appeal from a final judgment, plaintiffs instead voluntarily dismissed their claims with prejudice and immediately appealed the district court's order striking their class action allegations. *Id.* The Ninth Circuit held that this tactic was sufficient to create appellate jurisdiction to review the district court's order, notwithstanding its prior determination that the order did not warrant immediate review. App. 19a.

The Ninth Circuit's voluntary dismissal rule differs from the death knell doctrine in only one respect. Under the death knell doctrine, plaintiffs did not merely have to dismiss their claims; they had to prove that it would be infeasible for them to pursue their claims on an individual basis. *Livesay*, 437 U.S. at 466. But this distinction makes little difference in practice. Under the voluntary dismissal rule, a reversal of the class certification order appears to undo the plaintiffs' dismissal of his or her claims. App. 19a (reversing and remanding for further proceedings).[7] As a result, under either the death knell doctrine or the voluntary dismissal rule, plaintiffs who do not wish to pursue their individual claims

---

[7] The Ninth Circuit has not explained why a plaintiff should not be held to a decision to dismiss his or her claims with prejudice, but the order here suggests that this decision is revocable. Of course, if there is no basis for a plaintiff to revive his or her claims on remand, he or she would not have standing to appeal the class certification order. *See, e.g.*, *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980); *cf. Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013). On the other hand, if the plaintiff can revoke his or her dismissal, it is difficult to see how the resulting judgment is sufficiently final to support an appeal.

can take an immediate appeal and, if they prevail, can resume litigating the claims on remand. Indeed, the voluntary dismissal rule is even more capacious than the death knell doctrine, as plaintiffs can dismiss their claims and take an appeal at whim, even without a finding from the district court that it would be impractical to continue litigating their claims on an individual basis.

The voluntary dismissal rule thus doubles down on the same flaws as the death knell doctrine—flaws that Rule 23(f) was designed to avoid. As in *Livesay*, "[t]he potential waste of judicial resources is plain." 437 F.3d at 473. This case provides a good example. The Ninth Circuit held that the district court erred in striking the class allegations because it relied on a ruling that had since been undermined by an intervening Ninth Circuit decision. App. 18a-19a. The court of appeals expressly stated that it "express[ed] no opinion," however, on whether a class should be certified. App. 19a. As a result, the district court must consider on remand any grounds for opposing class certification that Microsoft may offer in response to a motion to certify the putative class. If the district court denies class certification on any of those grounds, the plaintiffs can voluntarily dismiss their claims again and take another appeal.

To make matters worse, the threat of piecemeal appeals resulting from the voluntary dismissal rule is not limited to orders denying class certification. In rejecting the death knell doctrine, this Court acknowledged that there was no principled basis for limiting the doctrine to class certification orders. *See Livesay*, 437 U.S. at 470. The Court explained: "[I]f

the 'death knell' doctrine has merit, it would apply equally to the many interlocutory orders in ordinary litigation—rulings on discovery, on venue, on summary judgment—that may have such tactical economic significance that a defeat is tantamount to a 'death knell' for the entire case." *Id.* The Third Circuit recently made the same point in rejecting the voluntary dismissal rule. *See Camesi v. Univ. of Pitt. Med. Ctr.*, 729 F.3d 239, 245-45 (3d Cir. 2013) (If the court "were to permit such a procedural sleight-of-hand, there is nothing to prevent litigants from employing such a tactic to obtain review of discovery orders, evidentiary rulings, or any of the myriad decisions that a district court makes before it reaches the merits of an action.").

The Ninth Circuit's voluntary dismissal rule, like the death knell doctrine, also unfairly disadvantages defendants. The rule necessarily applies only to plaintiffs because only plaintiffs have claims to dismiss. Although an order certifying a class can have dramatic effects on a defendant—which is why Rule 23(f) permits all parties to petition for interlocutory review, *see supra* at 6-9—defendants have no comparable method for manufacturing an allegedly final order or for otherwise generating an immediate appeal as a matter of right.

This Court rejected the death knell doctrine because it wasted judicial resources and did not apply equally to all parties. The voluntary dismissal rule should be rejected for the same reasons.

II. This Case Presents an Ideal Vehicle to Resolve an Issue of Critical Importance to the Business Community.

This case presents a question of great importance to the Chamber, because the nation's businesses are regularly named as defendants in class-action suits. These businesses have a strong interest in seeing that federal class-action law is interpreted and applied to provide a level playing field between plaintiffs and defendants.

A. The importance of providing defendants with the same appeal rights as plaintiffs has only increased in the nearly four decades since *Livesay*. Plaintiffs have increasingly sought to pursue claims on behalf of nationwide classes, which "can propel the stakes of a case into the stratosphere." *Blair*, 181 F.3d at 834. Cases involving consumer goods, such as the Xbox consoles at issue here, clearly illustrate the threat. Although the potential value of any purchaser's claim presumably is a fraction of the purchase price of a console, the class in this case, according to Microsoft, "may exceed 10 million people." Pet. 16. As this example makes clear, a plaintiff with a claim worth a few hundred dollars can potentially represent a class seeking billions of dollars in damages.

The issue presented is especially important given that the voluntary dismissal rule is applied by the Ninth Circuit. California is a popular forum for class-action plaintiffs because its consumer protection statutes are considered to be plaintiff friendly and because it offers the largest pool of potential

plaintiffs and putative class members. Indeed, one recent study showed that more than 20% of class actions filed in federal courts were filed in California.[8] Given the disproportionate number of class actions filed in California, the rules applied by the Ninth Circuit have particular significance.

B. Despite the importance of the question presented, many cases in which the issue arises will not provide a good vehicle for addressing it. This case, however, presents an ideal vehicle to resolve the circuit split.

Defendants in appeals involving voluntary dismissals in the Second and Ninth Circuits often have no basis to seek this Court's review. Defendants typically prevail on the merits of the appeal, because the district court's denial of class certification is reviewed under the deferential abuse-of-discretion standard. *See, e.g., Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1066 (9th Cir. 2014). When a defendant prevails on appeal, it cannot seek this Court's review of the voluntary dismissal rule because judgment has been entered in its favor.[9]

---

[8] Robert J. Herrington, *The Numbers Game:* Dukes *and* Concepcion (Nov. 20, 2012), http://bit.ly/1L0S9pI.

[9] The importance of the question presented is not diminished by the fact that defendants typically prevail on appeal. By permitting piecemeal appeals of class certification rulings as of right, the voluntary dismissal rule wastes judicial resources and imposes significant costs on the parties. *See Livesay*, 437 U.S. at 473-74. That is true regardless of the outcome of the appeals.

In theory, the Court could review the question presented in a petition filed by a plaintiff in a case from a circuit that has rejected the voluntary dismissal rule. But class-action plaintiffs have little incentive to litigate this procedural issue in those circuits. Plaintiffs may not want to invite a decision from this Court that could resolve the circuit split in defendants' favor when the voluntary dismissal rule is still available in actions filed in the Second and Ninth Circuits. And, even if a plaintiff wished to seek this Court's review, he or she would first have to incur the time and expense of taking an appeal that is foreclosed by circuit precedent, and then incur the additional time and expense of seeking this Court's review, which of course is rarely granted.

Moreover, even if the Court granted certiorari and ruled for the plaintiff, he or she would not receive any direct financial benefit from the victory. Instead, if the Court adopted the voluntary dismissal rule, the only benefit to the plaintiff would be the chance to argue in the court of appeals that the denial of class certification was an abuse of discretion—an argument that is unlikely to prevail. *See supra* at 14. Given these obstacles, a plaintiff seeking to challenge the denial of class certification in a circuit that does not follow the voluntary dismissal rule will almost certainly conclude that it is easier to litigate his or her own claim on the merits than to try to overturn the binding circuit precedent.

In contrast to these hypothetical cases in which the question presented is unlikely to reach the Court, this case squarely presents the question and there are no obstacles to the Court's resolving it. The par-

ties have fully litigated the jurisdictional issue, and the issue is outcome determinative. The Court therefore should grant the petition and resolve the circuit split.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be reversed.

Respectfully submitted,

Kate Comerford Todd
Warren Postman
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062

Mark W. Mosier
Counsel of Record
Michael M. Maya
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
mmosier@cov.com
(202) 662-6000

Counsel for Amicus Curiae

November 2015

AND
BRIEFS

FILED
NOV 12 2015
OFFICE OF THE CLERK

No. 15-457

In the Supreme Court of the United States

MICROSOFT CORPORATION,
Petitioner,

v.

SETH BAKER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF DRI-THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

LAURA E. PROCTOR
President of DRI—
The Voice of the Defense Bar
55 W. Monroe St.
Suite 2000
Chicago, IL 60603

MARY MASSARON
Counsel of Record
HILARY A. BALLENTINE
PLUNKETT COONEY
38505 Woodward Ave.
Suite 2000
Bloomfield Hills, MI 48304
(313) 983-4801
mmassaron@plunkettcooney.com

Counsel for Amicus Curiae DRI –
The Voice of the Defense Bar

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

The Court Should Grant Review To Resolve Conflicting Circuit Decisions And Clarify That Class Plaintiffs Cannot Force Appellate Courts To Hear A De Facto Interlocutory Appeal From An Order Denying Class Certification By Voluntarily Dismissing Their Claims With Prejudice 6

A. The Ninth Circuit's decision destroys the discretion given to the appellate courts in Federal Rule of Civil Procedure 23(f) by forcing the courts to review these non-final decisions–many of which have already been once considered and rejected 6

B. The Ninth Circuit's decision is inconsistent with traditional understandings of the effect of a voluntary dismissal with prejudice 10

C. The appeal tactic permitted by the Ninth Circuit inures only to the benefit of class plaintiffs and distorts the balance of the civil justice system by placing unfair pressures on defendants 13

D. This Court should take the case now, before further disagreement permeates the courts of appeals 17

CONCLUSION **19**

TABLE OF AUTHORITIES

CASES

Alamance Indus., Inc. v. Filene's,
291 F.2d 142 (1st Cir. 1961) 12

Baker v. Microsoft Corp.,
797 F.3d 607 (9th Cir. 2015) 4, 10

Baltimore Contractors v. Bodinger,
348 U.S. 176 (1955) 8

Berger v. Home Depot USA, Inc.,
741 F.3d 1061 (9th Cir. 2014) 10, 17

Bowe v. first of Denver Mortg. Investors,
613 F.2d 798 (10th Cir. 1980) 4

Camesi v. Univ. of Pittsburgh Med. Ctr.,
729 F.3d 239 (3d Cir. 2013) 4, 10, 11

Catlin v. United States,
324 U.S. 229 (1945) 6

Chamberlan v. Ford Motor Co.,
402 F.3d 952 (9th Cir. 2005) 9

Chavez v. Illinois State Police,
251 F.3d 612 (7th Cir. 2001) 5

Comcast Corp. v. Behrend,
133 S. Ct. 1426 (2013) 1

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) . . . . . *passim*

Dalton v. Lee Publications, Inc.,
625 F.3d 1220 (9th Cir. 2010) 2

Dannenberg v. Software Toolworks,
16 F.3d 1073 (9th Cir. 1994) 11

Deposit Guar. Nat'l Bank v. Roper,
445 U.S. 326 (1980) 11, 18

Druhan v. Am. Mut. Life,
166 F.3d 1324 (11th Cir. 1999) 5

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974) 6, 16

Fairley v. Andrews,
578 F.3d 518 (7th Cir. 2009) 11

Filarsky v. Delia,
132 S. Ct. 1657 (2012) 17

Firestone Tire & Rubber Co. v. Risjord,
449 U.S. 368 (1981) 6

Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
903 F.2d 176 (2d Cir. 1990), *cert. denied*, 498 U.S. 1025 (1991) 5

Gulfstream Aerospace Corp. v. Mayacamas Corp.,
485 U.S. 271 (1988) 8

Matter of Rhone-Poulenc Rorer, Inc.,
51 F.3d 1293 (7th Cir. 1995) 15, 16

Parkinson v. April Industries, Inc.,
520 F.2d 650 (2d Cir. 1975) 9

Parko v. Shell Oil Co.,
739 F.3d 1083 (7th Cir. 2014) 15

Piper Aircraft Co v. Reyno,
454 U.S. 235 (1981) 18

Rhodes v. E.I. DuPont de Nemours & Co.,
636 F.3d 88 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 499 (2011) 4, 5

Saavedra et al. v. Eli Lilly & Co.,
Case No. 2:12:cv-09366 (United States District Court for the Central District of California) ... 18

Thorogood v. Sears, Roebuck and Co.,
547 F.3d 742 (7th Cir. 2008) 15

Wal-Mart Stores, Inc. v. Dukes,
131 S. Ct. 2541 (2011) 1

STATUTES

28 U.S.C. § 1291 ..... 6, 7, 10, 18

28 U.S.C. § 1292 6

28 U.S.C. § 1292(b) 2, 4, 7

28 U.S.C. § 1292(e) 8

31 U.S.C. § 3730(b)(1) 12

RULES

Fed. R. Civ. P. 23 ..... 1, 8

Fed. R. Civ. P. 23, Advisory Committee Notes to 1998 Amendments, Subdivision (f) 2, 8, 9

Fed. R. Civ. P. 23(e) 12

Fed. R. Civ. P. 23(f) ..... *passim*

Fed. R. Civ. P. 41(a) 4, 10, 13, 18

Fed. R. Civ. P. 41(a)(1) 11, 12

Fed. R. Civ. P. 66 12

Sup. Ct. R. 37.2(a) 1

Sup. Ct. R. 37.6 1

OTHER AUTHORITIES

5 Moore, Federal Practice P41.05 (2d ed. 1951) ... 12

Michael B. Barnett, *The Plaintiffs' Bar Cannot Enforce the Laws: Individual Reliance Issues Prevent Consumer Protection Classes in the Eighth Circuit*, 75 Mo. L. Rev. 207 (Winter 2010) 16

Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251 (2002) 15

Henry J. Friendly, *Federal Jurisdiction: A General View* (1973) 16

Kenneth S. Gould, 1 J. App. Prac. & Process 309 (1999) 14

Christopher A. Kitchen, *Interlocutory Appeal of Class Action Certification Decisions Under Federal Rule of Civil Procedure 23(f): A Proposal For A New Guideline*, Colum. Bus. L. Rev. 231 (2004) 14

Barry F. McNiel, *et. al.*, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483 (updated 8/5/96) 15

Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97 (2009) 15

S. Rep. No. 109-15, 17 20-21 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 21 16

Barry Sullivan & Amy Kobeleski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277 (2008) 14

Joe Van Acker, Consumers Pulling a Fast One in Cymbalta Case, Eli Lilly Says, *Law 360* (October 14, 2015) 17, 18

Thomas E. Willging & Shannon R. *15 Wheatman, Attorney Choice of Forum in Class Action Litigation: *What Difference Does It Make?* 81 Notre Dame L. Rev. 591 (2006) 15, 16

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI – The Voice of the Defense Bar, is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to promote the role of defense attorneys, to address issues germane to defense attorneys and their clients, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient. See http://www.dri.org/About. To promote these objectives, DRI participates as amicus curiae in cases that raise issues important to its membership, their clients, and the judicial system, including a number of cases raising important issues concerning class-action practice. *See, e.g.*, *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). This is one of those cases.

When proposed classes fail to satisfy the generally applicable requirements of Federal Rule of Civil Procedure 23 for adjudicating the claims of many different persons at once, class certification is denied.

---

[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), amicus curiae certifies that counsel of record for both petitioner and respondent have, after timely notification, consented to this filing in letters on file with the Clerk's office.

Plaintiffs can then petition "for *permission*" to appeal the adverse class certification decision under Rule 23(f), which grants the appellate courts discretion in determining whether to grant interlocutory appellate review of a district court order granting or denying certification. Advisory Committee Note (1998); *Dalton v. Lee Publications, Inc.*, 625 F.3d 1220, 1221 (Judge O'Scannlain, dissenting) (9th Cir. 2010). DRI has a strong interest in ensuring that the rules of civil procedure are consistently and fairly enforced in order to provide a fair and balanced civil justice system rather than circumvented - as demonstrated in this case – where a class plaintiff who was unsuccessful in seeking Rule 23(f) interlocutory review voluntary dismisses his case with prejudice in order to manufacture finality for purposes of forcing the appellate court to consider the class certification decision at the outset. This tactic is not available to defendants when class certification is granted, and thus results in a one-way avenue for an appeal. And equally problematic, it allows appeals from decisions that fail the test for interlocutory review under Rule 23(f) and 28 U.S.C. § 1292(b). Thus, the Ninth Circuit's decision directly affects the fair, efficient, and consistent functioning of our civil justice system. As such, it is of vital interest to the members of DRI.

DRI has a unique vantage point to help this Court understand the importance of proper adherence to the outer bounds of the appellate courts' jurisdiction over class certification decisions, not only from a legal standpoint, but also from practical and economic standpoints as well. DRI's members regularly must defend their clients against class suits in a wide variety of contexts. Accordingly, DRI, alone and in conjunction

with other legal organizations, has conducted seminars studying these lawsuits long before this case. DRI has also compiled a Class Action Compendium, which was designed to provide civil defense lawyers and corporate counsel with an understanding of the intricacies of class action practice and procedure. These and other seminars and writings on class action litigation also reveal DRI's longstanding interest in mass action litigation. DRI has also submitted testimony regarding the federal rules of civil procedure, potential legislation relating to class actions, and other issues arising from class action litigation.

Based on its members' extensive practical experience, DRI is uniquely suited to explain why this Court should take this case to settle the current disagreement between the circuits and announce a rule which adheres to the limits of appellate review of class certification decisions as set forth in Rule 23(f).

SUMMARY OF ARGUMENT

The Ninth Circuit's decision in this case casts aside fundamental rules and limits of appellate jurisdiction in order to allow class plaintiffs to force an immediate appeal of a class certification denial. Employing a flawed analysis, the Ninth Circuit ruled that class plaintiffs who were previously unsuccessful in obtaining interlocutory appellate review of class certification denial under Federal Rule of Civil Procedure 23(f) can obtain a second chance at an interlocutory appeal of the certification order simply by voluntarily dismissing their case with prejudice under Rule 41(a). *Baker v. Microsoft Corp.*, 797 F.3d 607 (9th Cir. 2015). That ruling, which runs afoul of 28 U.S.C. § 1292(b), Federal Rule of Civil Procedure 23(f), and this Court's decision in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), robs the appellate courts of their discretion to determine what class certification decisions warrant interlocutory appellate review and creates a one-way street for opportunistic plaintiffs looking to force defendants into high-dollar settlement through multiple appeals despite the existence of a meritorious defense.

This Court should grant review to make clear that class plaintiffs may not strong-arm an appellate court to hear a de facto interlocutory appeal from an order denying class certification by voluntarily dismissing their claims with prejudice. This rule maintains a fair and balanced system and is the favored approach of five circuits that addressed the issue. *See, Bowe v. first of Denver Mortg. Investors*, 613 F.2d 798 (10th Cir. 1980); *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239 (3d Cir. 2013); *Rhodes v. E.I. DuPont de*

Nemours & Co., 636 F.3d 88, 100 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 499 (2011); *Chavez v. Illinois State Police*, 251 F.3d 612 (7th Cir. 2001); *Druhan v. Am. Mut. Life*, 166 F.3d 1324 (11th Cir. 1999). However, the Ninth and Second Circuits have adopted the opposite view that such tactics are permissible. *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 178-79 (2d Cir. 1990), *cert. denied*, 498 U.S. 1025 (1991). This Court can resolve the current circuit split by granting review and reversing the Ninth Circuit's decision, reaffirming the principles announced in *Coopers & Lybrand* and properly applied by the circuit majority.

Absent review from this Court, the defense bar will have no way to know the outer bounds of the courts' appellate jurisdiction and therefore will not be able to make informed strategic decisions in defending class suits. The current circuit split renders the status of the law unclear and fosters unpredictability. Further, absent review, class plaintiffs will likely migrate to the two circuits that have upheld this strategy, creating a forum-shopping scenario disfavored by the courts. This Court should grant review to reaffirm its prior pronouncement and clarify that voluntarily dismissing their claims with prejudice does not allow class plaintiffs to force an immediate appeal of a non-final certification order. This comports with Rule 23(f), which makes review of such certification orders purely discretionary. Creative tactics should not allow plaintiffs to eviscerate the discretion vested in the courts under the plain language of the rule. Review is therefore warranted.

ARGUMENT

The Court Should Grant Review To Resolve Conflicting Circuit Decisions And Clarify That Class Plaintiffs Cannot Force Appellate Courts To Hear A De Facto Interlocutory Appeal From An Order Denying Class Certification By Voluntarily Dismissing Their Claims With Prejudice

A. The Ninth Circuit's decision destroys the discretion given to the appellate courts in Federal Rule of Civil Procedure 23(f) by forcing the courts to review these non-final decisions– many of which have already been once considered and rejected

Federal appellate jurisdiction generally depends on the existence of a *final* decision "which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Catlin v. United States*, 324 U.S. 229, 233 (1945). The finality requirement serves an important purpose: preventing "the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974). The courts of appeals are statutorily granted jurisdiction to consider appeals "from all final decisions" of the district courts. 28 U.S.C. § 1291. Because "the finality requirement embodied in § 1291 is jurisdictional in nature[, i]f the appellate court finds that the order from which a party seeks to appeal does not fall within the statute, its inquiry is over." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981). Limited statutory exceptions to the finality requirement, set

forth in 28 U.S.C. § 1292, are typically inapplicable to orders denying class certification, except in the rare case where the district court determines that the order involves a "controlling question of law as to which there is substantial ground for difference of opinion," in which case the courts of appeals have discretion to permit an interlocutory appeal. 28 U.S.C. § 1292(b). This is because "[a]n order refusing to certify, or decertifying, a class does not of its own force terminate the entire litigation because the plaintiff is free to proceed on his individual claim." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978).

In *Coopers & Lybrand*, this Court held that "orders relating to class certification are not independently appealable under § 1291 prior to judgment" – even if the prejudgment order denying class certification would sound the "death knell" of the class action. *Id.* at 470. The "death knell" doctrine "assumes that without the incentive of a possible group recovery the individual plaintiff may find it economically imprudent to pursue his lawsuit to a final judgment and then seek appellate review of an adverse class determination." *Id.* at 469-70. Writing for a unanimous Court, Justice Stevens rejected the death knell doctrine as a means to manufacture finality, announcing that "the fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering it a 'final decision' within the meaning of § 1291." *Id.* at 477. In so doing, the Court recognized that the doctrine creates a one-way street for plaintiffs to obtain appellate jurisdiction of prejudgment orders denying class certification:

> First, the doctrine operates only in favor of plaintiffs even though the class issue—whether to certify, and if so, how large the class should be—will often be of critical importance to defendants as well. Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense. Yet the Courts of Appeals have correctly concluded that orders granting class certification are interlocutory. Whatever similarities or differences there are between plaintiffs and defendants in this context involve questions of policy for Congress.

Id. at 476. The Court was therefore mindful that any "choices" concerning whether to extend or reduce jurisdiction "falls in the legislative domain." *Baltimore Contractors v. Bodinger*, 348 U.S. 176, 181 (1955), overruled other gds, *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988).

After *Coopers & Lybrand*, Congress enacted 28 U.S.C. § 1292(e), which authorized the Supreme Court to "prescribe rules...to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for..." The Supreme Court's response in the class action context was to adopt Federal Rule of Civil Procedure 23(f), which authorizes a court of appeals to permit a timely "appeal from an order granting or denying class-action certification[.]" Fed. R. Civ. P. 23(f). *Id.* The Advisory Committee Notes to Rule 23(f) make clear that the drafters intended the courts of appeals to enjoy discretion to grant or deny permission to appeal "based on any consideration the

court of appeals finds persuasive." Fed. R. Civ. P. 23, Advisory Committee Notes to 1998 Amendments, Subdivision (f).

The Ninth Circuit's decision runs directly afoul of Rule 23(f) and the discretion given to the courts of appeals to grant interlocutory review of class certification orders. As the Ninth Circuit itself has observed, "the drafters [of Rule 23(f)] intended interlocutory appeal to be the exception rather than the rule." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005). But the Ninth Circuit's decision directly contradicts its prior recognition that "petitions for Rule 23(f) review should be granted sparingly." *Id.* Perhaps best explained in *Coopers & Lybrand*, the Ninth Circuit's decision "thrusts appellate courts indiscriminately into the trial process and thus defeats one vital purpose of the final-judgment rule-'that of maintaining the appropriate relationship between the respective courts. . . [a] goal, in the absence of most compelling reasons to the contrary, is very much worth preserving.'" *Coopers & Lybrand*, *supra* at 476, quoting *Parkinson v. April Industries, Inc.*, 520 F.2d 650, 654 (2d Cir. 1975). The rule adopted by the Ninth Circuit completely erodes this balance by permitting non-final decisions to act as final decisions through strategic appeal tactics – tactics rejected by this Court. 437 U.S. at 476-77.

In short, the Ninth Circuit's ruling in this case distorts the carefully-calibrated balance of Rule 23(f) by eliminating all discretion granted to the courts of appeals to determine those select class certification decisions that warrant interlocutory review. It does so by allowing class plaintiffs to invoke the voluntary

dismissal rule, Fed. R. Civ. P. 41(a), to "manufacture" finality by stipulating to dismiss their claims with prejudice and forcing an appeal of the class certification decision. *Baker v. Microsoft Corp.*, 797 F.3d 607 (9th Cir. 2015). In the Ninth Circuit's view, class plaintiffs can invoke the court of appeals' jurisdiction under § 1291 "because a dismissal of an action with prejudice, even when such dismissal is the product of a stipulation, is a sufficiently adverse – and thus appealable – final decision." *Id.* at 612, quoting *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1065 (9th Cir. 2014). The Ninth Circuit's decision makes no attempt to limit the circumstances under which plaintiffs can force jurisdiction upon the appellate court, even though the plaintiffs in that case were previously unsuccessful in seeking interlocutory appellate review under Rule 23(f). *Baker*, *supra*, at 611.

B. The Ninth Circuit's decision is inconsistent with traditional understandings of the effect of a voluntary dismissal with prejudice

This Court should grant review to consider and reverse the Ninth Circuit's decision. Class plaintiffs must not be permitted to manufacture finality and force an immediate appeal of an order denying class certification simply by voluntarily dismissing their claims with prejudice. The very core of the Ninth Circuit's position "reflects a fundamental misunderstanding of the nature of a dismissal with prejudice." *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 247 (3d Cir. 2013). Once a plaintiff voluntarily dismisses his or her claims with prejudice, those claims "are gone forever" – in other words, "not reviewable" by the appellate court and not permitted to

be "recaptured at the district court level." *Id.*, citing *Fairley v. Andrews*, 578 F.3d 518, 522 (7th Cir. 2009) and *Dannenberg v. Software Toolworks*, 16 F.3d 1073, 1077 (9th Cir. 1994). This comports with the rule that a party must be "aggrieved" by a district court judgment or order in order to have standing to appeal. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980). In its simplest terms, appellate review is reserved for a losing party seeking reversal of an adverse decision. It is not intended to be used by a plaintiff who has gripes with an interlocutory ruling but nonetheless agrees to dismiss his own case with prejudice. In that situation, the plaintiff is no longer an "aggrieved party" entitled to obtain appellate review.

Parties regularly dismiss counts of a complaint, theories of the case, or entire complaints on a voluntary basis. Federal Rule of Civil Procedure 41(a)(1) expressly allows for this. However, the traditional understanding is that once a plaintiff has done so, he cannot obtain subsequent appellate review of those abandoned theories. And even if a plaintiff does attempt to appeal, the appellate court will affirm on the grounds of waiver or abandonment of the issues via the voluntarily dismissal with prejudice. Allowing an appeal to proceed under this scenario – as the Ninth Circuit's decision does –will undermine the rule of law, causing grave confusion to litigants trying to resolve and termination litigation as to some theories or issues, and resulting in increased appellate litigation asking courts to overturn dismissals entered into by agreement.

This will turn the concept of voluntary dismissals on its head and require increased court intervention. Already, in some contexts– including if a class has been certified – court approval is required for a voluntary dismissal under Rule 41(a)(1). See, e.g., Fed. R. Civ. P. 23(e) (requiring court approval for voluntary dismissal of "[t]he claims, issues, or defenses of a certified class"); Fed. R. Civ. P. 66 (requiring a court order to dismiss any action in which a receiver has been appointed); 31 U.S.C. § 3730(b)(1) (plaintiffs cannot dismiss an action brought under the False Claims Act unless "the court and the Attorney General give written consent to the dismissal and their reasons for consenting."). The primary purpose of requiring a court order in such circumstances is "to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions." *Alamance Indus., Inc. v. Filene's*, 291 F.2d 142, 146 (1st Cir. 1961), citing 5 Moore, Federal Practice P41.05 (2d ed. 1951). Stated another way, while the voluntary dismissal mechanism serves several laudable goals – including saving the courts and parties time and money and aiding in the efficient operation of the civil justice system – it can undermine the legal system if used as a mere tool to obtain an appeal of a non-final issue that was decided prior to the agreement to voluntarily dismiss the case. This is precisely what the Ninth Circuit's decision accomplishes.

C. The appeal tactic permitted by the Ninth Circuit inures only to the benefit of class plaintiffs and distorts the balance of the civil justice system by placing unfair pressures on defendants

The need for this Court's review is underscored by the practical ramifications of the Ninth Circuit's decision on the businesses and individuals DRI's members regularly defend in class suits. The decision turns class action rules on their head and imposes economic and other improper strains on defendants. It does so in two major ways:

First, the Ninth Circuit's decision creates a one way-street which "operates only in favor of plaintiffs[.]" *Coopers & Lybrand*, *supra*, at 476. It is well-settled that only plaintiffs can opt to voluntarily dismiss their cases under Rule 41(a). Defendants have no such right; they can only be dismissed by the plaintiff or the court. However, the certification issue "will often be of critical importance to defendants as well." *Id.* In short, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle the case and to abandon a meritorious defense." *Id.* Accordingly, the Ninth Circuit's decision gives class plaintiffs a procedural "leg up" in that it allows them to immediately appeal an order denying class certification, but disallows defendants from appealing an order certifying a class unless the court of appeals exercises its discretion under Rule 23(f) to consider the appeal on an interlocutory basis.

The fairer rule, and the one Amicus Curiae urges this Court to adopt, is that both plaintiffs *and*

defendants seeking review of a class certification decision before entry of a final judgment must proceed under Rule 23(f). If the court of appeals declines to exercise its discretionary jurisdiction under Rule 23(f), then there will be no appellate review of the certification decision – at least not until the district court issues a final decision. This puts class plaintiffs and defendants on a level playing field and restores the equity component built into Rule 23(f), which allows appeals "from an order granting *or* denying class-action certification under this rule..." Fed. R. Civ. P. 23(f) (emphasis added).

Second, the realized threat of not one, but two bites at the proverbial appellate apple (exemplified here, where the class plaintiffs first sought and were denied interlocutory appellate review under Rule 23(f) and then voluntarily dismissed their claims with prejudice and took an appeal) will force defendants into high-dollar settlements even if a meritorious defense exists. Even in the ordinary course, the grant or denial of a motion for class certification is a defining moment in the class action. Barry Sullivan & Amy Kobeleski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 278 (2008) ("Arguably, the most critical stage in a class action is the point at which the court decides whether to certify the class."); Christopher A. Kitchen, *Interlocutory Appeal of Class Action Certification Decisions Under Federal Rule of Civil Procedure 23(f): A Proposal For A New Guideline*, Colum. Bus. L. Rev. 231, 232 (2004) ("A court's decision whether to certify a class is often the decisive moment in a class action...."); Kenneth S. Gould, 1 J. App. Prac. & Process 309, 312 (1999) ("The decision is often crucial....[it] can have a life or death

impact on the course of class action litigation...."); *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014) ("the unwieldiness, the delay, and the danger that class treatment would expose the defendant or defendants to settlement-forcing risk are not costs worth incurring."). The certification decision becomes even more significant and protracted in light the Ninth Circuit's allowance of an immediate appeal from an order denying class treatment. In short, even if the district court denies class certification and the court of appeals denies the plaintiffs' request for review under Rule 23(f), the tactic permitted by the Ninth Circuit will require defendants to spend considerable resources to defend a full-fledged appeal of the class certification decision before even beginning to litigate the merits the claims.

This will place intense pressure on defendants to settle, even if an adverse judgment ultimately seems "improbable." See *Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742, 745 (7th Cir. 2008); *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). See also Barry F. McNiel, *et. al.*, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 489-90 (updated 8/5/96). It is common knowledge that "the vast majority of certified class actions settle, most soon after certification." Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1291-92 (2002) ("[E]mpirical studies ... confirm what most class action lawyers know to be true."); see also Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009) ("With vanishingly rare exception, class certification [leads to] settlement, not full-fledged testing of the plaintiffs' case by trial."); Thomas E.

Willging & Shannon R. *15 Wheatman, Attorney Choice of Forum in Class Action Litigation: *What Difference Does It Make?* 81 Notre Dame L. Rev. 591, 647 (2006) ("[A]lmost all certified class actions settle."). Even where the district court denies class certification and the court of appeals declines to review that decision under Rule 23(f), the threat of defending an additional appeal may tip the scales towards settlement. Failing to consider and reverse the Ninth Circuit's decision will only exacerbate these problems and proliferate more of these "blackmail settlements." *Rhone, supra* at 1298, citing Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). Simply put, "[s]uch leverage can essentially force corporate defendants to pay ransom..." S. Rep. No. 109-15, 17 20-21 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 21; Michael B. Barnett, *The Plaintiffs' Bar Cannot Enforce the Laws: Individual Reliance Issues Prevent Consumer Protection Classes in the Eighth Circuit*, 75 Mo. L. Rev. 207, 208 (Winter 2010).

Careful adherence to the finality requirement and Rule 23(f) serves to guard against the ills set forth above. Appeals of class certification decisions brought after exhaustion of Rule 23(f)'s remedy under the backdrop of a voluntary dismissal harm the civil justice system, both because they create enormous litigation costs with no attendant benefit and because the appeals destabilize the carefully-calibrated equilibrium the rules were designed to create. They also foster inefficiency by allowing "piecemeal appeal disposition[,]" which in turn creates a "debilitating effect on judicial administration[.]" *Eisen,* 417 U.S. at 170. And, as discussed above, the strain this places on

the individuals and businesses that DRI's members are regularly called on to defend cannot be overstated.

D. This Court should take the case now, before further disagreement permeates the courts of appeals

The time is ripe for this Court to provide guidance to the bench and bar on whether plaintiffs may immediately appeal an order denying class certification by voluntarily dismissing their claims with prejudice. The current status of the law, plagued by inconsistency among the circuits to have addressed this issue, encourages forum shopping to the two circuits that permit this strategy. While this Court's general practice has been to allow issues to "percolate" to some degree in the courts of appeals before taking them up, this Court has never insisted that percolation run through every crevice of the judiciary before granting certiorari. *See, e.g., Filarsky v. Delia*, 132 S. Ct. 1657, 1661 (2012) (resolving 1-1 circuit conflict). The current five-to-two split constitutes sufficient percolation and evidences that this Court's guidance is not only proper, but necessary.

This issue is not going away. In 2014, the Ninth Circuit issued another published decision approving of this appeal strategy. *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061 (9th Cir. 2014). The rapid spread of this appeal tactic is likely to continue, both in the Second and Ninth Circuits and elsewhere. Right now, the Central District of California is determining whether to allow a proposed class' attempt to voluntarily dismiss their concealment claims with prejudice "in a transparent bid for a second chance to appeal orders denying their motions for class certification." Joe

Van Acker, Consumers Pulling a Fast One in Cymbalta Case, Eli Lilly Says, *Law 360* (October 14, 2015) (citing *Saavedra et al. v. Eli Lilly & Co.*, Case No. 2:12:cv-09366 (United States District Court for the Central District of California).

Absent review by this Court, the federal courts will continue to apply 28 U.S.C. § 1291 and Federal Rules of Civil Procedure 41(a) and 23(f) inconsistently. This Court's review is therefore needed to resolve the circuit conflict and engender uniformity on the issue of whether class plaintiffs can use the voluntary dismissal rule to manufacture a final order. The current inconsistency among the appellate circuits leaves DRI's members unable to predict accurately for their clients the outcome of class certification requests. Certainly, the Ninth and Second Circuit's decisions will encourage potential class members to forum-shop, a practice looked upon with disfavor by the Court. See *Piper Aircraft Co v. Reyno*, 454 U.S. 235, 254 (1981); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980). Beyond that, because of confusion among the federal circuits, DRI's members and clients have no way of knowing what standard the remaining circuits will apply. DRI therefore urges this Court to take this case and announce a clear rule that is capable of consistent application across the country.

CONCLUSION

For the reasons discussed in this brief and in the petition for a writ of certiorari, this Court should grant review and address the important issue raised by this appeal.

Respectfully submitted,

MARY MASSARON
Counsel of Record
HILARY A. BALLENTINE
PLUNKETT COONEY
38505 Woodward Ave., Suite 2000
Bloomfield Hills, MI 48304
(313) 983-4801
mmassaron@plunkettcooney.com

LAURA E. PROCTOR
President of DRI—
The Voice of the Defense Bar
55 W. Monroe St., Suite 2000
Chicago, IL 60603

Counsel for Amicus Curiae DRI –
The Voice of the Defense Bar

RECORD AND BRIEFS

NOV 12 2015

OFFICE OF THE CLERK

No. 15-457

IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,
Petitioner,

v.

SETH BAKER, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

HUGH F. YOUNG, JR.
PRODUCT LIABILITY ADVISORY COUNCIL, INC.
1850 Centennial Park Drive
Suite 510
Reston, VA 20191
(703) 264-5300
Of Counsel

JOHN H. BEISNER
Counsel of Record
JESSICA DAVIDSON MILLER
GEOFFREY M. WYATT
JORDAN SCHWARTZ
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000
John.Beisner@skadden.com

Attorneys for Amicus Curiae

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. The Ninth Circuit's Decision Reinforces A Circuit Split, Runs Counter To Supreme Court Precedent And Circumvents Rule 23(f). 5

II. The Rule Followed By The Ninth Circuit Is Damaging To American Product Manufacturers. 11

CONCLUSION 14

Corporate Members Of The Product Liability Advisory Council 1a

TABLE OF AUTHORITIES

Page(s)

CASES

AT&T Mobility LLC v. Concepcion,
131 S. Ct. 1740 (2011) 12

Berger v. Home Depot USA, Inc.,
741 F.3d 1061 (9th Cir. 2014) 9

Bowe v. First of Denver Mortgage Investors,
613 F.2d 798 (10th Cir. 1980) 10

In re Bridgestone/Firestone, Inc.,
288 F.3d 1012 (7th Cir. 2002) 13

Camesi v. University of Pittsburgh Medical Center,
729 F.3d 239 (3d Cir. 2013) 7, 10

Castano v. American Tobacco Co.,
84 F.3d 734 (5th Cir. 1996) 13

Chavez v. Illinois State Police,
251 F.3d 612 (7th Cir. 2001) 7

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) 4, 5, 6, 7

Druhan v. American Mutual Life,
166 F.3d 1324 (11th Cir. 1999) 7

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974) 6

Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
903 F.2d 176 (2d Cir. 1990) 7

Rhodes v. E.I. du Pont de Nemours & Co.,
636 F.3d 88 (4th Cir. 2011) 7

Shannon v. General Electrical Co.,
186 F.3d 186 (2d Cir. 1999) 8

RULE

Fed. R. Civ. P. 23(f) 10

OTHER AUTHORITIES

Basic Strategic Considerations in Defending Consumer Class Actions Against Franchisors,
33 Franchise L.J. 167 (2013) 12

Panel 7: Class Actions as an Alternative to Regulation: The Unique Challenges Presented by Multiple Enforcers and Follow-On Lawsuits,
18 Geo. J. Legal Ethics 1311 (2005) 12

The Class Action Fairness Act of 2005: The Limits of Its Text and the Need for Legislative Clarification, Not Judicial Interpretation,
38 Fla. St. U. L. Rev. 679 (2011) 13

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Product Liability Advisory Council ("PLAC") respectfully submits this brief as *amicus curiae* in support of petitioner Microsoft Corporation ("petitioner" or "Microsoft").[1]

STATEMENT OF INTEREST

PLAC is a non-profit association with over 100 corporate members representing a broad cross-section of American and international product manufacturers.[2] These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product-liability defense attorneys in the country are sustaining (non-voting) members of PLAC.

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that petitioner and respondents have consented to the filing of this *amicus* brief and that *amicus curiae* timely notified counsel of record of its intent to file this brief.

[2] A list of PLAC's current corporate membership is attached to this brief as Appendix A.

Since 1983, PLAC has filed more than 1,050 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product manufacturers.

PLAC's members have an interest in this case because the decision below endorses a rule that favors plaintiffs in dubious class actions that fail at class certification by allowing them to voluntarily dismiss their claims and obtain an immediate appellate ruling on class certification – *even after* the Court of Appeals refuses to hear the appeal on a Rule 23(f) petition. The effect of the ruling is to hand plaintiffs a second bite at the apple (with no corresponding opportunity for defendants to seek review notwithstanding denial of a Rule 23(f) petition). That approach to appellate jurisdiction is fundamentally at odds with this Court's prior precedent strictly limiting interlocutory review of class-certification orders. Moreover, the decision below will make the defense of putative class actions more expensive for PLAC's members given the additional layer of appeals that will be mounted by plaintiffs disappointed by an unfavorable class-certification ruling. The Court should grant review and reverse to resolve a percolating circuit split over this important issue.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a prime opportunity for the Court to resolve a significant question that has divided the federal courts of appeals: whether plaintiffs can manufacture appellate jurisdiction over an adverse class-certification ruling by voluntarily dismissing their claims instead of litigating them on an individual basis to final judgment. The answer to this question is clearly no in light of prior precedent from this Court eliminating the so-called "death knell" doctrine as a basis for appealing an interlocutory class-certification ruling. While most federal appellate courts to confront this issue have recognized as much, the court below and the Second Circuit have failed to do so, leaving a significant divide among the circuits.

In this case, plaintiffs are Xbox 360 console owners alleging a design defect in the product that scratches game discs. However, only a tiny fraction of the putative class experienced the alleged defect at issue. The district court struck the class allegations, relying heavily on a prior ruling from a different judge denying class certification in a virtually indistinguishable case involving a different set of plaintiffs. According to the district court, the class allegations were due to be stricken because individual issues of causation and damages precluded class treatment. Plaintiffs subsequently sought permission to appeal the class-certification ruling under Rule 23(f), arguing that "the district court's order effectively kill[ed] this case." Pet. for Permission to Appeal Under Fed. R. Civ. P. 23(f) at 18. The Ninth Circuit denied the petition and remanded the case to the district court. Pet. App. 10a. Rather than press

their individual claims, plaintiffs voluntarily dismissed them for the express purpose of appealing the district court's unfavorable class-certification ruling. The Ninth Circuit took the appeal and reversed.

The Ninth Circuit's assumption of jurisdiction over plaintiffs' appeal ignored this Court's prior command that "the fact that an interlocutory [class-certification] order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering it a 'final decision' within the meaning of § 1291." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 (1978). In so doing, the Ninth Circuit departed from the majority of circuits to address the issue and joined the Second Circuit in resurrecting the so-called "death knell" doctrine as a basis for appealing an unfavorable class-certification ruling.

If left to stand, the decision below will spur the type of piecemeal litigation that this Court has previously proscribed and permit plaintiffs to circumvent Rule 23(f) – the only authorized avenue for appealing an interlocutory class-certification ruling before a final judgment on the merits. Because the Ninth Circuit clearly got it wrong and deepened a division among the circuits on this fundamental issue, the Court should grant the petition and reverse.

The decision below also has the potential to do great harm to American product manufacturers, providing further grounds for granting the petition. Class actions are already inherently expensive for product manufacturers to defend given their high stakes – namely, the risk of a potentially crippling class verdict. But these costs would only increase under the approach endorsed by the Ninth Circuit, which would add an additional layer of uncertain and

expensive appellate litigation to the class-certification calculus. Further, that approach unfairly gives plaintiffs a second opportunity at appellate review of an adverse class-certification ruling, increasing their settlement leverage over American businesses.

For both of these reasons, the Court should grant the petition to resolve a deepening circuit split and hold that the only avenue for immediately appealing an unfavorable class-certification ruling is seeking a discretionary appeal under Rule 23(f).

ARGUMENT

I. The Ninth Circuit's Decision Reinforces A Circuit Split, Runs Counter To Supreme Court Precedent And Circumvents Rule 23(f).

The decision below deepens a significant circuit split over whether plaintiffs can manufacture appellate jurisdiction over adverse class-certification orders and places the Ninth Circuit squarely on the wrong side of this growing divide. Following this Court's precedents, most courts have rejected appellate jurisdiction in these circumstances, but the decision below adds to a growing minority of contrary rulings.

The seminal decision is this Court's ruling in *Livesay*. The Eighth Circuit concluded in that case that it had jurisdiction over an order decertifying a class action on the ground that the lower court's ruling "had sounded the 'death knell' of the action" and constituted a final judgment for purposes of 28 U.S.C. § 1291. 437 U.S. at 466. The court of appeals had reasoned that the lack of resources and anticipated costs as a practical matter prevented the plaintiffs

from pursuing their claims individually through trial, effectively converting the decertification order into a final judgment. *Id.* at 466-67.

This Court reversed, holding that "[a]n order refusing to certify, or decertifying, a class does not of its own force terminate the entire litigation *because the plaintiff is free to proceed on his individual claim.*" *Id.* at 467 (emphasis added). In reaching its decision, the Court underscored the importance of the final judgment rule embodied in § 1291: it "evinces a legislative judgment that '[r]estricting appellate review to "final decisions" prevents the debilitating effects on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy.'" *Id.* at 471-72 (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974)). The so-called "death knell" doctrine, the Court declared, runs "directly contrary" to that legislative judgment because it predicates appellate jurisdiction on a costly and inefficient examination of the possible impact a class-certification order will have on the fate of the litigation. *Id.* at 471, 473-74 (internal quotation marks and citation omitted). As the Court explained, "the principal vice" of the "death knell" doctrine is that it "authorizes *indiscriminate* interlocutory review of decisions made by the trial judge," disregarding the fact that "Congress carefully confined the availability of such review." *Id.* at 474.

In addition, the Court recognized that the doctrine unfairly "operates only in favor of plaintiffs" by giving them an immediate and automatic right to appeal "even though the class issue – whether to certify, and if so, how large the class should be – will often be of critical importance to defendants as well." *Id.* at 476. Accordingly, because Congress "made 'finality'

the test of appealability," *id.* at 472, "the fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering it a 'final decision' within the meaning of § 1291," *id.* at 477.

Since *Livesay*, most federal appeals courts have understood its reasoning to bar efforts by plaintiffs "to manufacture finality" by voluntarily dismissing their claims following the denial of class certification. *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 245-47 (3d Cir. 2013) (plaintiffs could not "avoid the strong presumption against interlocutory review of such orders by voluntarily dismissing all of their claims under Rule 41"); see also, *e.g.*, *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 100 (4th Cir. 2011) (court lacked appellate jurisdiction where "putative class plaintiff voluntarily dismisse[d] the individual claims underlying a request for class certification"), *cert. denied*, 132 S. Ct. 499 (2011); *Chavez v. Ill. State Police*, 251 F.3d 612, 629 (7th Cir. 2001) (declining to "review the district court's refusal to certify a class" when "the plaintiffs requested and were granted a voluntary dismissal of their . . . claims").[3]

The Second Circuit took the opposite view, holding that the voluntary dismissal of a named

---

[3] The Eleventh Circuit has applied a similar rule with respect to other interlocutory orders. See *Druhan v. Am. Mut. Life*, 166 F.3d 1324, 1325-26 (11th Cir. 1999). As the court explained, "[t]he problem with [assuming jurisdiction of an interlocutory order following the voluntary dismissal of claims] is that it is not statutorily authorized. Congress has clearly stated the circumstances under which [a circuit] court may hear an appeal from an interlocutory order." *Id.* at 1326 (citing 28 U.S.C. § 1292 (1994)).

plaintiff's claims suffices to confer appellate jurisdiction over a class-certification denial. See *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 178-79 (2d Cir. 1990) (jurisdiction existed where named plaintiff invited dismissal by failing to prosecute case after denial of class certification). According to the decision in *Gary Plastic*, *Livesay* is "inapplicable" in this situation because "immediate appellate review will only be available to disappointed class representatives who risk forfeiting their potentially meritorious individual claims." *Id.* at 179.

Within nine years, however, the Second Circuit had recognized that its position "ha[d] been rejected by other circuits," and it announced that *Gary Plastic* should be construed as a "narrow exception[]" that cannot generally be extended to permit a plaintiff to voluntarily dismiss and then appeal an interlocutory ruling in most cases. *Shannon v. Gen. Elec. Co.*, 186 F.3d 186, 192-93 (2d Cir. 1999). Indeed, the Second Circuit notably avoided endorsing *Gary Plastic* in 1999, instead concluding that the case before it did not present an occasion to "revisit our holding[]" in *Gary Plastic* because it concerned an attempt to appeal from a different kind of interlocutory order. *Id.* at 193.

Undeterred by the doubts expressed about the Second Circuit's approach by some of that court's own judges, the Ninth Circuit embraced the minority side of the split, reasoning that it had jurisdiction in the present case "under 28 U.S.C. § 1291 because a dismissal of an action with prejudice, even when such dismissal is the product of a stipulation, is a sufficiently adverse – and thus appealable – final decision." Pet. App. 12a (internal quotation marks

and citation omitted).[4] Notably, the Ninth Circuit's cursory discussion of appellate jurisdiction *did not even cite Livesay* – or any of the many decisions by other circuit courts addressing whether *Livesay* permits appeals in these circumstances. Far less did it attempt to explain how the exercise of jurisdiction in the present case can be reconciled with that binding authority.

The decision below is clearly wrong because it runs afoul of *Livesay* by reviving the "death knell" doctrine that this Court previously rejected. As the Third Circuit succinctly explained in rejecting plaintiffs' "attempts to manufacture finality" by voluntarily dismissing their claims in the wake of a class-certification denial:

> [i]f we were to allow such a procedural sleight-of-hand to bring about finality . . . there is nothing to prevent litigants from employing such a tactic to obtain review of discovery orders, evidentiary rulings, or any of the myriad decisions a district court makes before it reaches the merits of an action.

---

[4] The Court of Appeals relied heavily on a prior decision by another panel, holding that "'in the absence of a settlement, a stipulation that leads to a dismissal with prejudice does not destroy the adversity in that judgment necessary to support an appeal. . . .'" Pet. App. 12a (quoting *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1064 (9th Cir. 2014)). *Berger* was wrongly decided for all the same reasons and, not surprisingly, also did not acknowledge *Livesay* or the decisions of other circuits construing it. See generally 741 F.3d 1061. Because the defendant prevailed on appeal in *Berger*, there was no occasion to present the Ninth Circuit's flawed jurisdictional analysis to this Court in that case.

Camesi, 729 F.3d at 245-46. Permitting such tactics "would greatly undermine the policy against piecemeal litigation embodied by § 1291," *id.* at 246 – the very policy that prompted this Court to retire the "death knell" doctrine as a basis for immediately appealing class-certification orders. As the Tenth Circuit put it, the only difference between *Livesay* and a case in which a plaintiff voluntarily dismisses a claim in the hope of manufacturing appellate jurisdiction is that the death knell in the latter case is more "graphic." *Bowe v. First of Denver Mortg. Investors*, 613 F.2d 798, 800 (10th Cir. 1980) (court lacked appellate jurisdiction where plaintiff allowed claim to be dismissed for failure to prosecute after class certification had been denied). The effect in both circumstances is the same: to permit essentially interlocutory review as a matter of right for disappointed class plaintiffs. This Court's decision in *Livesay* "does not tolerate creation of a loophole by the simple device of allowing the claim of a class representative to be dismissed" voluntarily. *Id.* at 800-02.

Moreover, the error of the panel's decision is made all the more glaring in view of Rule 23(f), which authorizes *discretionary* appeals of class-certification orders. See Fed. R. Civ. P. 23(f) ("A court of appeals *may* permit an appeal from an order granting or denying class-action certification . . . .") (emphasis added). As the petition points out, Rule 23(f) by design imbues courts of appeals with absolute discretion to grant review of an order addressing class certification, leaving them "free to reject plaintiffs' Rule 23(f) petitions for any reason." Pet. at 18. That is precisely what the Ninth Circuit did when it denied plaintiffs' petition for interlocutory review

under Rule 23(f), over plaintiffs' argument that the district court's order sounded the "death knell" for plaintiffs. See *id.* at 4. By allowing plaintiffs to dismiss and appeal, the Ninth Circuit enabled plaintiffs' evasion of that discretionary decision, nullifying the discretionary nature of class-certification appeals.

For all of these reasons, the Court should grant certiorari and reverse the Ninth Circuit's decision, clarifying that plaintiffs may *not* evade *Livesay* and Rule 23(f) by voluntarily dismissing their claims in the wake of an adverse class-certification ruling in order to seek immediate appellate review of that unfavorable decision.

II. The Rule Followed By The Ninth Circuit Is Damaging To American Product Manufacturers.

The Court should also grant certiorari and reverse the decision below because affording plaintiffs multiple opportunities for appellate review of adverse class-certification rulings will hurt American product manufacturers. Although Rule 23(f) is supposed to limit class-action appeals (and by extension the costs associated with litigating them), the Ninth Circuit's rule is likely to spawn dismissals and appeals in every case involving an unsuccessful class-certification bid. Moreover, because the Ninth Circuit's rule works only in favor of plaintiffs, it will provide them with greater leverage over defendants in settlement negotiations, using the threat of possible reversal on an appeal that never should have been allowed to force resolution. For both reasons, the Ninth Circuit's rule stands to greatly expand the costs of litigation and the potential exposure to liability in questionable class actions.

This development is a bad one for American manufacturers. "By their very nature, class actions are high-stakes endeavors. A verdict in a consumer fraud class action will deliver a crippling blow to all but the most well-heeled" defendant. John Doroghazi & Armel Jacobs, *Basic Strategic Considerations in Defending Consumer Class Actions Against Franchisors*, 33 Franchise L.J. 167, 192-93 (2013); see also *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (recognizing the "higher stakes of class litigation"). Indeed, according to a 2015 study, companies spent $2 billion on class action lawsuits in 2014. *The 2015 Carlton Fields Jorden Burt Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation*, at 3; see also Bruce Hoffman, Remarks, *Panel 7: Class Actions as an Alternative to Regulation: The Unique Challenges Presented by Multiple Enforcers and Follow-On Lawsuits*, 18 Geo. J. Legal Ethics 1311, 1329 (2005) (panel discussion statement of Bruce Hoffman, then Deputy Director of the Federal Trade Commission's Bureau of Competition) (noting the "very high cost for everybody concerned, courts, defendants, plaintiffs of litigating a class action . . . ."). Simply put, defending against putative class actions is already an inherently expensive proposition for American businesses given the high stakes involved – i.e., the risk of a gargantuan class verdict. Granting plaintiffs an additional layer of appeals in every case involving an adverse class-certification ruling will needlessly prolong class-action litigation, generating further litigation costs for American manufacturers.

Moreover, because the approach endorsed by the Ninth Circuit only inures to the benefit of *plaintiffs* –

not defendants – plaintiffs would gain greater leverage over defendants in inducing settlements. Defendants faced with improvidently certified, meritless lawsuits already feel intense pressure to settle before trial, culminating in "judicial blackmail." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("These settlements have been referred to as judicial blackmail."); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015-16 (7th Cir. 2002) ("Aggregating millions of claims on account of multiple products manufactured and sold across more than ten years makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable – and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims."); see also Kristen L. Wenger, *The Class Action Fairness Act of 2005: The Limits of Its Text and the Need for Legislative Clarification, Not Judicial Interpretation*, 38 Fla. St. U. L. Rev. 679, 688 (2011) ("Critics of class action litigation have also pointed out that the propensity for plaintiffs' lawyers to file allegedly frivolous lawsuits and the potential for massive jury verdicts have generally been sufficient to force corporations into settling unfounded claims or deter otherwise honest corporations from expanding their operations.").

Affording plaintiffs a second bite at the apple in seeking class certification will exacerbate the pressure to settle. The resultant increased costs of class litigation will put settlement pressure on many defendants, as will the possibility of reversal that would not exist but for the Ninth Circuit's one-sided rule.

For these reasons too, the Court should grant certiorari.

CONCLUSION

For the foregoing reasons, and those stated by petitioner Microsoft Corporation, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

HUGH F. YOUNG, JR.
PRODUCT LIABILITY ADVISORY COUNCIL, INC.
1850 Centennial Park Drive
Suite 510
Reston, VA 20191
(703) 264-5300
Of Counsel

JOHN H. BEISNER
Counsel of Record
JESSICA DAVIDSON MILLER
GEOFFREY M. WYATT
JORDAN SCHWARTZ
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000
John.Beisner@skadden.com

Attorneys for Amicus Curiae

November 12, 2015

APPENDIX A

Corporate Members Of The Product Liability Advisory Council

3M
Altec, Inc.
Altria Client Services LLC
Astec Industries
Bayer Corporation
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
The Boeing Company
Bombardier Recreational Products, Inc.
Boston Scientific Corporation
Bridgestone Americas, Inc.
Bristol-Myers Squibb Company
C. R. Bard, Inc.
Caterpillar Inc.
CC Industries, Inc.
Celgene Corporation
Chevron Corporation
Cirrus Design Corporation
Continental Tire the Americas LLC
Cooper Tire & Rubber Company
Crane Co.
Crown Cork & Seal Company, Inc.
Crown Equipment Corporation
Daimler Trucks North America LLC
Deere & Company
Delphi Automotive Systems
Discount Tire
The Dow Chemical Company
E.I. duPont de Nemours and Company
Eisai Inc.
Emerson Electric Co.

Endo Pharmaceuticals, Inc.
Exxon Mobil Corporation
FCA US LLC
Ford Motor Company
Fresenius Kabi USA, LLC
General Electric Company
General Motors LLC
Georgia-Pacific LLC
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
The Home Depot
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works Inc.
Isuzu North America Corporation
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Kawasaki Motors Corp., U.S.A.
KBR, Inc.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Lincoln Electric Company
Magna International Inc.
Mazak Corporation
Mazda Motor of America, Inc.
Medtronic, Inc.
Merck & Co., Inc.
Meritor WABCO
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.

Mueller Water Products
Novartis Pharmaceuticals Corporation
Novo Nordisk, Inc.
NuVasive, Inc.
Pella Corporation
Pfizer Inc.
Pirelli Tire, LLC
Polaris Industries, Inc.
Porsche Cars North America, Inc.
RJ Reynolds Tobacco Company
Robert Bosch LLC
SABMiller Plc
The Sherwin-Williams Company
St. Jude Medical, Inc.
Stanley Black & Decker, Inc.
Subaru of America, Inc.
Takeda Pharmaceuticals U.S.A., Inc.
TAMKO Building Products, Inc.
TASER International, Inc.
Techtronic Industries North America, Inc.
Teleflex Incorporated
TK Holdings Inc.
Toyota Motor Sales, USA, Inc.
TRW Automotive
U-Haul International
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen Group of America, Inc.
Volvo Cars of North America, Inc.
Wal-Mart Stores, Inc.
Western Digital Corporation
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.

AMICI BRIEFS

Supreme Court, U.S.
FILED
NOV 11 2015
OFFICE OF THE CLERK

No. 15-457

IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

v.

SETH BAKER, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AND INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

CORY L. ANDREWS
Counsel of Record
MARK S. CHENOWETH
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org

November 11, 2015

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether a federal court of appeals has jurisdiction to review an order denying class certification after the named plaintiffs voluntarily dismiss their claims with prejudice.

TABLE OF CONTENTS

TABLE OF AUTHORITIES v

INTERESTS OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 6

REASONS FOR GRANTING THE PETITION 8

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW UNDERMINES THIS COURT'S UNANIMOUS HOLDING IN *LIVESAY* 8

A. The Ninth Circuit's Holding Contravenes *Livesay*'s Policy Against Piecemeal Appeals 10

B. The Ninth Circuit's Holding Improperly Favors Plaintiffs over Defendants 11

II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW EXACERBATES AN EXISTING CIRCUIT SPLIT ON THE QUESTION PRESENTED 12

A. A Clear Majority of the Circuits to Consider the Question Squarely Reject the Ninth Circuit's Approach 12

B. Further Percolation Is Especially Unwarranted Given the Severe Disruption the Panel's Decision Is Already Causing 17

III. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT'S HOLDING RAISES IMPORTANT, RECURRING QUESTIONS OF FEDERAL LAW 18

A. The Ninth Circuit's Expansive Reading of § 1291 Is Inconsistent with the Proper Understanding of the Statute 18

B. The Ninth Circuit's Holding is Inconsistent with a Plain Reading of Rule 23(f) 20

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

Berger v. Home Depot USA, Inc.,
741 F.3d 1061 (9th Cir. 2014) 5, 6

Bobbitt v. Milberg,
801 F.3d 1066 (9th Cir. 2015) 17

Bowe v. First of Denver Mortg. Investors,
613 F.2d 798 (10th Cir. 1980) 13

Camesi v. Univ. of Pittsburgh Med. Ctr.,
729 F.3d 239 (3d Cir. 2013) 15

Campbell-Ewald Co. v. Gomez,
No. 14-857 (U.S., dec. pending) 1

Chavez v. Illinois State Police,
251 F.3d 612 (7th Cir. 2001) 14

Clapper v. Amnesty Int'l,
133 S. Ct. 1138 (2013) 1

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) ..... *passim*

Dart Cherokee Basin Operating Co. v. Owens,
135 S. Ct. 547 (2014) 1

Druhan v. Am. Mut. Life,
166 F.3d 1324 (11th Cir. 1999) 14

Page(s)

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974) 2

Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
903 F.2d 176 (2d Cir. 1990), *cert. denied*,
498 U.S. 1025 (1991) 16

Goodyear Dunlop Tires Operations, S.A. v. Brown,
131 S. Ct. 2846 (2011) 1

Henson v. Fid. Nat'l Fin., Inc.,
No. 14-56578 (9th Cir., dec. pending) 17

Himler v. Comprehensive Care Corp.,
993 F. 2d 1537 (4th Cir. 1993) 15

Marshall v. Sielaff,
492 F.2d 917 (3d Cir. 1974) 11, 16

Rhodes v. E.I. Du Pont de Nemours & Co.,
636 F.3d 88 (4th Cir. 2011), *cert. denied*,
132 S. Ct. 499 (2011) 15

Sayre v. The Musicland Grp., Inc.,
850 F.2d 350 (8th Cir. 1988) 22

Shannon v. Gen. Elec. Co.,
186 F.3d 186 (2d Cir. 1999) 17

Smith v. Microsoft Corp.,
No. 14-55807 (9th Cir., dec. pending) 18

Page(s)

Spokeo, Inc. v. Robins,
No. 13-1339 (U.S., dec. pending) 1

Standard Fire Ins. Co. v. Knowles,
133 S. Ct. 1345 (2013) 1

Strafford v. Eli Lilly & Co.,
No. 2:12-cv-09366-SVW-MAN (C.D. Cal., dec. pending) 18

Sullivan v. Pac. Indem. Co., 566 F.2d 444
(3d Cir. 1977) 11, 16

Will v. Hallock,
546 U.S. 345 (2006) 9

Woodward v. STP Corp.,
170 F.3d 1043 (11th Cir. 1999) 13, 14

RULES

Fed. R. Civ. P. 23 3

Fed. R. Civ. P. 23(f) 3, 4, 8, 20, 21, 22

Sup. Ct. R. 37.2(a) 1

Sup. Ct. R. 37.6 1

STATUTES

28 U.S.C. § 1291 ..... *passim*

28 U.S.C. § 2072(c) 20

Page(s)

OTHER AUTHORITIES

Advisory Committee Notes Accompanying 1998 Amendments to Rule 23, Federal Rules of Civil Procedure 20

Erwin Chemerinksy & Barry Friedman, *Federal Judicial Independence Symposium: The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757 (1995) 22

INTERESTS OF *AMICI CURIAE*[1]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF has frequently appeared in this and other federal courts in cases that examine limitations on the power of federal courts to exercise either subject matter or personal jurisdiction over parties and proceedings. *See, e.g., Spokeo, Inc. v. Robins*, No. 13-1339 (U.S., dec. pending); *Clapper v. Amnesty Int'l*, 133 S. Ct. 1138 (2013); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011). WLF has also appeared before this Court as an *amicus* to oppose procedural gamesmanship by the plaintiffs' bar. *See, e.g., Campbell-Ewald Co. v. Gomez*, No. 14-857 (U.S., dec. pending); *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014); *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013).

The National Association of Manufacturers (NAM) is the largest manufacturing association in

---

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), more than 10 days prior to the due date for this brief, counsel for *amici* notified counsel of record for all parties of *amici*'s intention to file. All parties to this dispute have consented to the filing of this brief, and letters of consent have been lodged with the Court.

the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

The International Association of Defense Counsel (IADC) is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system.

Amici strongly support faithful adherence to the jurisdictional statutes Congress enacted to prevent multiple, piecemeal appeals from a single district court proceeding. By strictly limiting the occasions in which a party may appeal an adverse ruling, those federal appellate rules "prevent[] the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974).

Amici are concerned that the decision below, if allowed to stand, will seriously undermine judicial administration by effectively providing plaintiffs an

absolute right to immediate review of a district court order denying a motion to certify a plaintiff class under Rule 23. Indeed, the decision could well result in numerous appeals from a single action. Affording appeals-as-of-right to unsuccessful class-certification movants is not only contrary to 28 U.S.C. § 1291, which manifests Congress's longstanding policy against multiple, piecemeal appeals, but it also undermines Rule 23(f), which permits immediate appeals from class certification orders to proceed at the sole discretion of the appeals court.

STATEMENT OF THE CASE

The petition presents a question of exceptional importance regarding the subject-matter jurisdiction of the federal appeals courts. Congress has granted the courts of appeals "jurisdiction of appeals from all final decisions of the district courts of the United States," subject to limited exceptions. 28 U.S.C. § 1291. At issue here is whether §1291 provided the Ninth Circuit with appellate jurisdiction to review the district court's order striking respondents' class allegations from the complaint.

Petitioner Microsoft Corporation (Microsoft) is a leading technology company that develops, manufactures, and sells (among other things) the Xbox 360 video game console. Respondents are five individuals who, in 2011, brought a putative class-action lawsuit against Microsoft alleging defective design of the Xbox 360 and requesting certification of a nationwide class of all similarly situated

purchasers.[2]

On March 27, 2012, on petitioner's motion, the U.S. District Court for the Western District of Washington struck respondents' class allegations from the complaint on the basis that causation and damages could not be proven in one stroke by common evidence. Invoking Rule 23(f), respondents sought an interlocutory appeal of the district court's order from the Ninth Circuit. Exercising its discretion to grant or deny such petitions, the Ninth Circuit denied appellate review and remanded the case back to the district court for individualized proceedings on the merits. Pet. App. 10a.

Rather than pursue their individual claims, respondents moved on remand to voluntarily dismiss their claims with prejudice, declaring their intention to appeal the district court's order striking the complaint's class allegations. Pet. App. 36a. Although Microsoft agreed to the district court's dismissal of respondents' claims with prejudice, it also maintained that respondents had no right to appeal the court's striking of class allegations following the voluntary dismissal. *Ibid.* Microsoft argued that the appeals court lacked jurisdiction to hear such an appeal because the order striking class

---

[2] In 2007, the same lawyers representing respondents in this case brought a nearly identical class action against Microsoft, also in the Western District of Washington. *See* Pet. App. 6a-8a. When the district court denied class certification, those plaintiffs unsuccessfully petitioned the Ninth Circuit for interlocutory appeal under Rule23(f). When the Ninth Circuit denied the petition, the plaintiffs agreed to resolve their individual claims with Microsoft.

allegations was not a "final decision" of the district court within the meaning of § 1291. "[R]eserving to all parties their arguments as to the propriety of any appeal," the district court dismissed respondents' claims with prejudice. *Id.* at 36a-37a.

Exercising jurisdiction over respondents' appeal, the Ninth Circuit reversed. The panel rejected Microsoft's jurisdictional argument solely on the basis of *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061 (9th Cir. 2014), a decision handed down after the appeal in the instant case was fully briefed. Pet. App. 11a-12a. The panel did not address Microsoft's contention that the order striking class allegations was not a "final decision" within the meaning of § 1291. Instead, the panel determined that the only relevant issue under § 1291 was whether respondents' voluntary dismissal of their claims deprived their appeal of the requisite "adversity." *Ibid.*

The panel concluded that respondents possessed sufficient adversity to warrant exercise of appellate jurisdiction, noting that *Berger* had rejected just such an absence-of-adversity contention:

> [*Berger*] distinguished a stipulated dismissal without a settlement from a stipulated dismissal with a settlement. The former retains sufficient adversity to sustain an appeal. The latter does not. As this case did not involve settlement, *Berger* establishes that "[we] have jurisdiction under 28 U.S.C. § 1291 because a dismissal of an action

> with prejudice, even when such dismissal is the product of a stipulation, is a sufficiently adverse—and thus appealable—final decision."

Pet. App. 12a (quoting *Berger*, 741 F.3d at 1064, 1065).

Turning to the availability of a class action, the panel concluded that the district court abused its discretion in striking the class allegations from the complaint. Pet. App. 19a. At the same time, the panel expressed no opinion "on whether the specific common issues identified in this case are amenable to adjudication by way of a class action, or whether plaintiffs should prevail on a motion for class certification." *Ibid.* Nor did the panel even attempt to address how the district court should proceed in the absence of any putative class representative with a live claim—each of the five respondents having voluntarily dismissed his individual claims with prejudice. The panel reversed the district court's order and remanded for further proceedings consistent with its opinion.

Microsoft's petition for rehearing en banc was denied. Pet. App. 5a.

SUMMARY OF ARGUMENT

The panel below held that a district court's adverse class determination becomes an immediately appealable, final order when the district court dismisses the action with prejudice—even when such dismissal is the product of a stipulation by the plaintiffs. That holding is inconsistent with this Court's decision in *Coopers & Lybrand v. Livesay*,

437 U.S. 463, 475 (1978), which held that allowing a plaintiff to appeal a class certification denial immediately as of right, rather than from a final judgment after trial, violates Congress's longstanding policy against multiple, piecemeal appeals. Such appeals are impermissible, the Court held, even when the denial of class certification tolls the "death knell" for the plaintiffs' case.

The decision below also directly conflicts with the decisions of at least five other federal courts of appeals—the Third, Fourth, Seventh, Tenth, and Eleventh Circuits. The panel's holding joins the Second Circuit in expanding a longstanding conflict in the courts of appeals concerning whether, and under what circumstances, a putative class plaintiff can ever appeal an adverse class-certification order by simply voluntarily dismissing his individual claims with prejudice. This well-recognized conflict among the lower courts requires this Court's intervention.

Review is also warranted because the Ninth Circuit's decision raises important, recurring questions of federal law. Indeed, the panel's expansive reading of 28 U.S.C. § 1291 is inconsistent with the proper understanding of that statute. As this Court has recognized, Congress adopted § 1291's "final decision" rule to ensure that controversies are not reviewed by appellate courts in a piecemeal fashion. The panel decision thus undermines § 1291 by permitting, and thus encouraging, piecemeal appeals. It also creates unfairness by effectively granting plaintiffs—but *not* defendants—an absolute right to immediate review of adverse class-certification orders.

As a result of the panel's deeply flawed decision below, plaintiffs effectively will get *at least* two (rather than one) appeals from adverse class certification rulings, thereby multiplying their chances of encountering a sympathetic panel. But such a result contravenes Federal Rule of Civil Procedure 23(f), which grants both plaintiffs and defendants the right to *request* interlocutory review of class-certification orders but provides appeals courts unreviewable discretion to deny the request. The entire purpose of the Federal Rules of Civil Procedure is to provide a uniform and orderly process of adjudicating cases in the federal system, but only this Court can now provide a single, uniform standard for the application of Rule 23(f).

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW UNDERMINES THIS COURT'S UNANIMOUS HOLDING IN *LIVESAY*

Given this Court's unanimous holding in *Coopers & Lybrand v. Livesay*, which held that orders concerning class certification are not appealable final orders under 28 U.S.C. § 1291, the holding below creates an anomaly by affording greater opportunity for plaintiffs than defendants to obtain judicial review of an adverse class certification determination. Inviting such an untoward result undermines this Court's clear precedent and does violence to the entrenched policy opposing piecemeal review. That "finality" rule, which derives from the Judiciary Act of 1791, promotes judicial efficiency and deters "the harassment and cost of a succession of separate appeals from the various rulings to which a litigation

may give rise." *Will v. Hallock*, 546 U.S. 345, 350 (2006) (internal quotations omitted).

In *Livesay*, the Court examined and rejected the "death knell" doctrine, under which several courts of appeals had exercised jurisdiction over appeals from district court orders that did not resolve all issues in the case. *See* 437 U.S. at 475. Under that doctrine, when deciding whether to exercise appellate jurisdiction, some appeals courts examined the impact of the district court order on the individual case. If those courts concluded that the costs of trying the individual's case so exceeded the potential judgment (considering the plaintiff's resources) that further pursuit of the plaintiff's claim was improbable, the order was deemed a "final decision" and thus subject to appeals court jurisdiction under § 1291.

In rejecting the "death knell" doctrine as a basis for permitting appeals from orders denying class certification, the Court explained that Congress adopted § 1291's "final decision" rule to ensure that controversies are not reviewed by appellate courts in a piecemeal fashion. 437 U.S. at 473. Recognizing the potential for abusive appeals, the Court concluded that the doctrine "would have a serious debilitating effect on the administration of justice" by permitting "multiple appeals" within a single case. *Id.* at 473-74. Most relevant here, the Court was critical of the fact that "the doctrine operates only in favor of plaintiffs even though the class issue—whether to certify, and if so, how large the class should be—will often be of critical importance to defendants as well." *Id.* at 476.

A. The Ninth Circuit's Holding Contravenes *Livesay*'s Policy Against Piecemeal Appeals

Congress's longstanding policy against piecemeal appeals, which drove the *Livesay* Court's construction of § 1291 in the context of class-certification appeals filed *before* entry of a final judgment, applies with equal force in the context of class-certification appeals filed *after* a dismissal with prejudice that results from the plaintiffs' refusal to proceed to trial. As a practical matter, if § 1291 were interpreted to permit a plaintiff to obtain immediate review of every adverse class determination order by procuring a dismissal with prejudice, it would render the venerable policy against piecemeal litigation and appeals a dead letter.

It is impossible to overstate the mischief that the Ninth Circuit's novel approach to appellate jurisdiction would foment if left undisturbed. As the Third Circuit has warned in a very similar context:

> If a litigant could refuse to proceed whenever a trial judge ruled against him, wait for the court to enter a dismissal for failure to prosecute, and then obtain review of the judge's interlocutory decision, the policy against piecemeal litigation and review would be severely weakened. This procedural technique would in effect provide a means to avoid the finality rule embodied in 28 U.S.C. § 1291. To review the district court's [order] ... under the facts of this case is to invite

> the inundation of appellate dockets with requests for review of interlocutory orders and to undermine the ability of trial judges to achieve the orderly and expeditious disposition of cases.

Sullivan v. Pac. Indem. Co., 566 F.2d 444, 445-46 (3d Cir. 1977) (citing *Marshall v. Sielaff*, 492 F.2d 917, 919 (3d Cir. 1974)).

Here, as in *Livesay*, allowing appeals of right from "orders that turn on the facts of a particular case thrusts appellate courts indiscriminately into the trial process and thus defeats one vital purpose of the final-judgment rule—'that of maintaining the appropriate relationship between the respective courts.'" *Ibid.* Absent this Court's review of the misguided decision below, that "vital purpose" will be abandoned entirely.

B. The Ninth Circuit's Holding Improperly Favors Plaintiffs over Defendants

By adopting a one-sided rule that favors plaintiffs over defendants, the panel decision conflicts with *Livesay*, which cautioned that rules governing appellate review ought to treat plaintiffs and defendants even-handedly. *Livesay*, 437 U.S. at 476 (rejecting "death knell" doctrine in part because "the doctrine operates only in favor of plaintiffs"). A decision to certify a class can just as readily sound the death knell of a class-action defense. After all, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to

settle and to abandon a meritorious defense. Yet the Courts of Appeals have correctly concluded that orders granting class certification are interlocutory." *Ibid.* Even so, the panel below created a pathway for plaintiffs by which they can always obtain pre-trial appellate review of class-certification orders while not creating a similar pathway for defendants.

II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW EXACERBATES AN EXISTING CIRCUIT SPLIT ON THE QUESTION PRESENTED

The circuit split presented here is real and pronounced, reflecting a clear and significant division of judicial authority on an important question of federal law. At least five federal circuits—the Third, Fourth, Seventh, Tenth, and Eleventh Circuits—have all held that an appeals court lacks jurisdiction to review a denial of class certification where the plaintiffs have caused their claims to be dismissed with prejudice. In contrast, both the Second and Ninth Circuits have held that a plaintiff's voluntary dismissal with prejudice creates a "sufficiently adverse" final decision from which to appeal an earlier class-certification denial.

A. A Clear Majority of the Circuits to Consider the Question Squarely Reject the Ninth Circuit's Approach

The panel below held that a district court's adverse class determination becomes an immediately appealable, final order when the district court dismisses the action with prejudice—even when such dismissal is the product of a stipulation by the

plaintiffs. That approach to the federal courts' appellate jurisdiction has been roundly rejected by at least five other circuits. Only this Court can now resolve the impasse among the courts of appeals.

In *Bowe v. First of Denver Mortg. Investors*, 613 F.2d 798, 801 (10th Cir. 1980), for example, the named plaintiff unsuccessfully sought class certification but then failed to prosecute her individual claims. When the district court ultimately dismissed the suit for lack of prosecution, the plaintiff contended on appeal that the dismissal constituted a final judgment entitling her to appellate review of the trial court's denial of class certification. *Ibid.*

The Tenth Circuit disagreed. Recognizing that this Court's decision in *Livesay* "does not tolerate creation of a loophole by the simple device of allowing the claim of a class representative to be dismissed for lack of prosecution," the appeals court concluded that review of the judgment "does not allow review of the order denying certification of the class." 613 F.2d at 801-02. Nor did the fact that "[t]he 'death knell' has indeed sounded" constitute "a genuine distinction between this case and *Livesay*." *Id.* at 802. As a result, the Tenth Circuit held that any appeal of the class issue was "interlocutory notwithstanding that the individual case of the class representative stands dismissed." *Id.*

Similarly, the Eleventh Circuit has held that it lacks jurisdiction over an appeal from a district court order vacating a state court's conditional class certification and refusing to remand the case back to state court. *Woodward v. STP Corp.*, 170 F.3d 1043

(11th Cir. 1999). In that case, the plaintiff filed a motion for certification in the district court, but then filed a motion for voluntary dismissal prior to obtaining a ruling on the motion for certification. 170 F.3d at 1044 n.2. The appeals court reasoned that because the named plaintiff did not obtain district court certification, he could not appeal directly from the order denying remand. *Id.* at 1044. And the order dismissing the case with prejudice was not appealable, the court concluded, "because it was obtained at the request of the plaintiff." *Ibid.*[3]

In *Chavez v. Illinois State Police*, 251 F.3d 612 (7th Cir. 2001), a putative class of minority motorists filed suit against the Illinois State Police for alleged violations of their civil rights during traffic stops. When the district court declined to certify the class or to permit a new plaintiff to be added, the plaintiffs voluntarily dismissed their remaining claims, with prejudice. 251 F.3d at 627. On appeal, plaintiffs sought review of (among other things) the district court's denial of class certification of the claims they had voluntarily dismissed. *Id.* at 628-29. The Seventh Circuit held that it was without jurisdiction to "review claims that were dismissed pursuant to plaintiffs' request for voluntary dismissal with prejudice." *Ibid.*

---

[3] In fact, the Eleventh Circuit has categorically refused to exercise appellate jurisdiction over *any* "appeal from a final judgment that resulted from a voluntary dismissal with prejudice." *Druhan v. Am. Mut. Life*, 166 F.3d 1324, 1325-26 (11th Cir. 1999) (dismissing appeal for want of jurisdiction because "[t]he dismissal with prejudice was requested only as a means of establishing finality in the case such that the plaintiff could appeal [an] interlocutory order—an order that the plaintiff believes effectively disposed of her case").

The Fourth Circuit requires the same result. In *Rhodes v. E.I. Du Pont de Nemours & Co.*, 636 F.3d 88 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 499 (2011), after the district court denied plaintiffs' motion for class certification of their medical monitoring claims, plaintiffs filed a stipulation of voluntary dismissal of those individual claims. 636 F.3d at 93-94. On appeal, the Fourth Circuit held that "when a putative class plaintiff voluntarily dismisses the individual claims underlying a request for class certification, as happened in this case, there is no longer a 'self-interested party' advocating for class treatment." *Id.* at 100. As a result, the appeals court held that it lacked jurisdiction to decide whether the district court had erred in denying class certification. *Ibid*; *see also Himler v. Comprehensive Care Corp.*, 993 F. 2d 1537 (4th Cir. 1993) (dismissing the appeal because the order denying class certification "had no effect on the merits of, nor imposed any legal impediment on, the underlying individual claims").

And in *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 245-47 (3d Cir. 2013), the Third Circuit likewise refused to allow plaintiffs' "impermissible attempt to manufacture finality" under 28 U.S.C. § 1291. In that case, the named plaintiffs voluntarily dismissed their individual claims with prejudice but sought to pursue an appeal on behalf of others who had opted into the litigation. 729 F.3d at 247. In dismissing the appeal for lack of an appealable order, the Third Circuit rejected the plaintiffs' attempt "to convert an interlocutory order into a final appealable order by obtaining dismissal." *Id.* at 245. "If we were to allow such a procedural sleight-of-hand to bring about finality here," the

appeals court concluded, "there is nothing to prevent litigants from employing such a tactic to obtain review of discovery orders, evidentiary rulings, or any of the myriad decisions a district court makes before it reaches the merits of an action." *Id.* at 245-46; *see also Sullivan*, 566 F.2d at 445-46 (quoting *Marshall*, 492 F.2d at 919).

The reasoned approach taken by the Third, Fourth, Seventh, Tenth, and Eleventh Circuits stands in direct conflict with the Ninth Circuit's decision below, and with the Second Circuit, which has similarly permitted a putative class plaintiff to obtain appellate review of a class-certification denial by failing to prosecute its individual claims, resulting in dismissal with prejudice.

In *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 78-79 (2d Cir. 1990), *cert. denied*, 498 U.S. 1025 (1991), the district court denied plaintiff's request for class certification and ultimately dismissed the complaint with prejudice, for failure to prosecute. When the plaintiff appealed the district court's class certification decision, the Second Circuit exercised jurisdiction on the basis that "immediate appellate review will only be available to disappointed class representatives who risk forfeiting their potentially meritorious individual claims, [so] reviewing the merits of the class certification order will not substantially undermine the policy against piecemeal review." 903 F.2d at 179.[4]

---

[4] While sitting on the U.S. Court of Appeals, then-Judge Sotomayor expressly acknowledged that the Second Circuit's

These conflicting appeals court decisions, which arrive at starkly divergent conclusions about the scope of a federal appeals court's jurisdiction, demonstrate the recurring importance of the question presented by the petition. Given the entrenched split among a majority of the circuits, it would be a mistake to allow this question to percolate any further before deciding to resolve it.

B. Further Percolation Is Especially Unwarranted Given the Severe Disruption the Panel's Decision Is Already Causing

Further percolation is especially unwarranted because the panel's expansive reading of 28 U.S.C. § 1291 is *already* having severe repercussions. Indeed, plaintiffs within the Ninth Circuit have already begun relying on the panel's decision to seek (and even obtain) review after securing a voluntary dismissal. *See, e.g.*, *Bobbitt v. Milberg*, 801 F.3d 1066 (9th Cir. 2015) (relying on the instant case to find jurisdiction over appeal after plaintiffs' "voluntary dismissal of their individual claims"); Appellant Henson's Reply Br. at 1, *Henson v. Fid. Nat'l Fin., Inc.*, No. 14-56578 (9th Cir., dec. pending), *available at* 2015 WL 4537372 (invoking the instant case in

---

tacit approval of piecemeal litigation by plaintiffs seeking review of an adverse interlocutory order "has been rejected by other circuits." *Shannon v. Gen. Elec. Co.*, 186 F.3d 186, 193 (2d Cir. 1999). She recognized that § 1291's finality rule "may come into conflict" with the Second Circuit's approach to merger, which "would reward [a plaintiff] for dilatory and bad faith tactics." 186 F.3d at 192 (citations and quotations omitted). Nonetheless, the rule persists in that circuit.

support of jurisdiction after voluntary dismissal); Reply Br. of Plaintiff-Appellant, *Smith v. Microsoft Corp.*, No. 14-55807 (9th Cir. Mar. 30, 2015), ECF 25 at 28-33; Plaintiffs' Motion to Dismiss, *Strafford v. Eli Lilly & Co.*, No. 2:12-cv-09366-SVW-MAN (C.D. Cal. Sep. 30, 2015), ECF 199 at 4 (invoking the instant case as a justification for voluntary dismissal with prejudice).

The petition squarely presents the Court with an excellent opportunity to provide much needed clarity on this issue and forestall further gamesmanship. If this entrenched split is not resolved, future class actions will undoubtedly be concentrated in the Second and Ninth Circuits, as the rule adopted in those circuits favors plaintiffs so dramatically. The Court should seize this opportunity to establish a single, nationally uniform rule that a plaintiff may not use the tactic of a voluntary dismissal with prejudice to obtain appellate review of a district court's adverse, interlocutory class certification ruling.

III. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT'S HOLDING RAISES IMPORTANT, RECURRING QUESTIONS OF FEDERAL LAW

A. The Ninth Circuit's Expansive Reading of § 1291 is Inconsistent with the Proper Understanding of the Statute

Review is also warranted because the panel failed to explain how an interlocutory order effectively denying class certification can be suddenly transformed into a "final decision" within

the meaning of 28 U.S.C. § 1291 when the district court enters a stipulated order dismissing the case with prejudice? The only reasonable answer to that question must be "no." Simply put, "the fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering it a 'final decision' within the meaning of § 1291." *Livesay*, 437 U.S. at 476.

The panel's contrary reading of 28 U.S.C. § 1291 is inconsistent with the proper understanding of that statute. As this Court recognized in *Livesay*, Congress adopted § 1291's "final decision" rule to ensure that controversies are not reviewed by appellate courts in a piecemeal fashion as issues arise. The decision below undermines § 1291 by effectively granting plaintiffs (but not defendants) an absolute right to immediate review of adverse class-certification orders.

Orders denying class certification do not merge into the judgment (and thus become unreviewable in an appeal under § 1291 from the final order of dismissal) when the final order of dismissal results from the plaintiffs' refusal to prosecute their claims. A contrary view would allow plaintiffs to use the dismissal order they procured as a vehicle to circumvent finality principles and secure piecemeal review of an interlocutory procedural ruling on class certification. By failing to address that issue, the panel implicitly adopted an expansive view of federal appellate jurisdiction that is inconsistent with longstanding notions of finality.

Permitting litigants to undertake piecemeal appeals whenever they disagree with adverse

decisions on class certification would unduly delay the resolution of district court litigation and needlessly burden the Courts of Appeals—precisely the outcome that § 1291 rejects.

B. The Ninth Circuit's Holding is Inconsistent with a Plain Reading of Rule 23(f)

The panel decision is also inconsistent with Rule 23(f), which grants both plaintiffs and defendants the right to *request* interlocutory review of class-certification orders but provides appeals courts unreviewable discretion to deny the request. By creating a means by which plaintiffs can essentially appeal class-certification orders as of right, the decision below undermines congressional direction that appeals courts' acceptance of such appeals be discretionary. *See* Advisory Committee Notes Accompanying 1998 Amendments to Rule 23 ("The court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari. ... Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive.").

Rule 23(f) was promulgated in reaction to *Livesay* to give courts unfettered discretion to hear appeals of class-certification rulings, but the rulemakers quite pointedly did not exercise their authority under 28 U.S.C. § 2072(c) to define such rulings as "final" orders appealable as a matter of right under § 1291. The Ninth Circuit, by contrast, holds that a district court's adverse class

determination becomes an immediately appealable, final order when the district court dismisses the action *with prejudice*—at the plaintiff's invitation. Not even under the strictly construed collateral-order doctrine, which is a narrow exception to the final-judgment rule, do courts countenance such a significant departure from settled principles of finality. *See Livesay*, 437 U.S. at 468-70.

In this case, the Ninth Circuit granted respondents an appeal-as-of-right, even though a different panel of that court had previously rejected their Rule 23(f) request to appeal from the district court's order striking all class allegations from the complaint. The first appeals court panel's discretion under Rule 23(f) to reject an interlocutory request was therefore no longer unreviewable once a second appellate panel was permitted to second-guess that discretionary denial. As a result, plaintiffs can effectively will get *at least* two (rather than one) appeals from adverse class certification rulings, thereby multiplying their chances of encountering a sympathetic panel.

The Ninth Circuit's holding also effectively eliminates Rule 23(f)'s directive that petitions for interlocutory appeals be filed expeditiously. While 23(f) requires such petitions to be filed within 14 days after the adverse order on class determination, the decision below permits plaintiffs to delay their appeal until up to 30 days after entry of the stipulated dismissal with prejudice—a dismissal that may well be entered months after a class determination ruling, as was the case here.

Because the widening split of circuit authority on the question presented turns in part on the application and interpretation of a Federal Rule of Civil Procedure, this Court's review is especially needed. After all, the entire purpose of the Federal Rules of Civil Procedure is to provide a uniform and orderly process of adjudicating cases in the federal system. Indeed, it was the disparity of legal process among the states that served as the primary catalyst for the federal rules in the first place. *See Sayre v. The Musicland Grp., Inc.*, 850 F.2d 350, 354 (8th Cir. 1988) (noting that "the purpose of the Federal Rules of Civil Procedure" was "to provide uniform guidelines for all federal procedural matters"); Erwin Chemerinksy & Barry Friedman, *Federal Judicial Independence Symposium: The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757, 780 (1995) (stating that the "primary justification for adopting the Federal Rules of Civil Procedure was to increase the uniformity in procedural rules in federal courts across the country").

A persistent, ongoing circuit split that frustrates the uniform application of Rule 23(f) undermines the purpose of having a system of standardized procedural rules in the federal system. Because only this Court can announce a single uniform standard for the application of Rule 23(f), the petition should be granted.

CONCLUSION

For the foregoing reasons, *amici curiae* Washington Legal Foundation, National Association of Manufacturers, and International Association of Defense Counsel respectfully request that the Court grant the petition.

Respectfully submitted,

CORY L. ANDREWS
Counsel of Record
MARK S. CHENOWETH
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, D.C. 20036
(202) 599-0302
candrews@wlf.org

November 11, 2015

RECORD AND BRIEFS

No. 15-457

IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

v.

SETH BAKER, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

STEPHEN M. RUMMAGE
Counsel of Record
DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue,
Suite 2200
Seattle, WA 98101
(206) 622-3150
steverummage@dwt.com
Counsel for Petitioner

PETER K. STRIS
Counsel of Record
STRIS & MAHER LLP
725 S. Figueroa St.,
Suite 1830
Los Angeles, CA 90017
(213) 995-6800
peter.stris@strismaher.com
Counsel for Respondents

PETITION FOR CERTIORARI FILED OCTOBER 9, 2015
CERTIORARI GRANTED JANUARY 15, 2016

TABLE OF CONTENTS

Page

Relevant Docket Entries, U.S. District Court, Western District of Washington at Seattle 1

Relevant Docket Entries, U.S. Court of Appeals for the Ninth Circuit, Case No. 12-80085 6

Relevant Docket Entries, U.S. Court of Appeals for the Ninth Circuit, Case No. 12-35946 7

Order Denying Motion to Certify Class, *In re Microsoft Xbox 360 Scratched Disc Litigation*, U.S. District Court, Western District of Washington at Seattle (October 5, 2009) 10

Order Denying Petition for Permission to Appeal, *Torres, et al. v. Microsoft Corp.*, U.S. Court of Appeals for the Ninth Circuit (January 21, 2010) 25

Amended Complaint – Class Action, U.S. District Court, Western District of Washington at Seattle (June 27, 2011) 26

Order on Defendant's Motion to Strike Plaintiffs' Class Allegations, U.S. District Court, Western District of Washington at Seattle (March 27, 2012) 88

TABLE OF CONTENTS—Continued

Page

Petition for Permission to Appeal under Federal Rule of Civil Procedure 23(f), U.S. Court of Appeals for the Ninth Circuit (April 9, 2012) 100

Order Denying Petition for Permission to Appeal, U.S. Court of Appeals for the Ninth Circuit (June 12, 2012) 121

Plaintiffs' Motion to Dismiss Case with Prejudice, U.S. District Court, Western District of Washington at Seattle (September 25, 2012) 122

NOTICE

The following documents have been omitted from the printing of this Joint Appendix. They may be found in the Petitioner's Appendix to the 15-457 Petition For A Writ Of Certiorari at the following pages:

Appendix A, Order and Amended Opinion of the U.S. Court of Appeals for the Ninth Circuit 1a

Appendix B, District Court Stipulation and Order Granting Plaintiffs' Motion to Dismiss with Prejudice 35a

U.S. DISTRICT COURT FOR WESTERN WASHINGTON, SEATTLE

Case No. 2:11-cv-00722-RSM

SETH BAKER, ET AL.,

v.

MICROSOFT CORPORATION,

RELEVANT DOCKET ENTRIES

DATE	NO.	DOCKET TEXT
04/28/2011	1	COMPLAINT against defendant(s) Microsoft Corporation
06/27/2011	10	AMENDED COMPLAINT against defendant(s) Microsoft Corporation with JURY DEMAND
07/20/2011	14	MOTION to Strike Plaintiffs' Class Allegations or, in the Alternative, Deny Certification of Plaintiffs' Proposed Classes by Defendant Microsoft Corporation. Oral Argument Requested
07/20/2011	15	DECLARATION of Hiroo Umeno filed by Defendant Microsoft Corporation re [14] MOTION to Strike Plaintiffs' Class Allegations or, in the Alternative, Deny Certification of Plaintiffs' Proposed Classes

DATE	NO.	DOCKET TEXT
07/20/2011	16	**SEALED DOCUMENT** Exhibits 1-5 to Dkt 15 - Umeno Declaration in Support of Microsoft Corporation's Motion to Strike Class Allegations by Defendant Microsoft Corporation
07/20/2011	17	DECLARATION of Fred B. Burnside filed by Defendant Microsoft Corporation re [14] MOTION to Strike Plaintiffs' Class Allegations or, in the Alternative, Deny Certification of Plaintiffs' Proposed Classes
09/16/2011	23	RESPONSE, by Plaintiffs Seth Baker, Jesse Bernstein, Matthew Danzig, James Jarrett, Nathan Marlow, Mark Risk, to [14] MOTION to Strike Plaintiffs' Class Allegations or, in the Alternative, Deny Certification of Plaintiffs' Proposed Classes
09/16/2011	24	DECLARATION of Amy Williams-Derry filed by Plaintiffs Seth Baker, Jesse Bernstein, Matthew Danzig, James Jarrett, Nathan Marlow, Mark Risk in Support of Plaintiffs' Opposition to Defendants' [14] MOTION to Strike Plaintiffs' Class Allegations or, in the Alternative, Deny Certification of Plaintiffs' Proposed Classes

DATE	NO.	DOCKET TEXT
09/16/2011	25	DECLARATION of KEVIN COLUCCIO filed by Plaintiffs Seth Baker, Jesse Bernstein, Matthew Danzig, James Jarrett, Nathan Marlow, Mark Risk re [14] MOTION to Strike Plaintiffs' Class Allegations or, in the Alternative, Deny Certification of Plaintiffs' Proposed Classes
10/14/2011	26	REPLY, filed by Defendant Microsoft Corporation, TO RESPONSE to [14] MOTION to Strike Plaintiffs' Class Allegations or, in the Alternative, Deny Certification of Plaintiffs' Proposed Classes
10/14/2011	27	Supplemental DECLARATION of Stephen M. Rummage in Support of Microsoft Corporation's Motion to Strike Class Allegations filed by Defendant Microsoft Corporation re [14] MOTION to Strike Plaintiffs' Class Allegations or, in the Alternative, Deny Certification of Plaintiffs' Proposed Classes
03/27/2012	32	ORDER granting dft's [14] Motion to strike pltfs' class allegations by Judge Ricardo S Martinez
09/25/2012	35	MOTION to Dismiss with Prejudice by Plaintiffs Seth Baker, Jesse Bernstein, Matthew Danzig, James Jarrett, Nathan Marlow, Mark Risk

DATE	NO.	DOCKET TEXT
10/16/2012	37	STIPULATION AND ORDER granting pltf's [35] Motion to Dismiss by Judge Ricardo S Martinez
11/15/2012	38	NOTICE OF APPEAL (12-35946) to Ninth Circuit re [37] Order on Motion to Dismiss by Plaintiffs Seth Baker, Jesse Bernstein, Matthew Danzig, James Jarrett, Nathan Marlow, Mark Risk
03/14/2013	40	ORDER of USCA (12-35946) as to [38] Notice of Appeal, filed by Nathan Marlow, Mark Risk, Jesse Bernstein, Matthew Danzig, James Jarrett, Seth Baker. Appellees motion to dismiss this appeal for lack of jurisdiction is denied without prejudice to renewing the arguments in the answering brief
09/26/2013	41	ORDER of USCA (12-35946) as to [38] Notice of Appeal, filed by Nathan Marlow, Mark Risk, Jesse Bernstein, Matthew Danzig, James Jarrett, Seth Baker; Appellants unopposed motion for permission for appellant Jesse Bernstein to dismiss his appeal is granted
03/19/2015	42	OPINION of USCA (NOT THE MANDATE 12-35946) as to [38] Notice of Appeal, filed by Nathan Marlow, Mark Risk, Jesse Bernstein, Matthew Danzig, James Jarrett, Seth Baker

DATE	NO.	DOCKET TEXT
07/20/2015	43	ORDER AND AMENDED OPINION (NOT THE MANDATE 12-35946) as to [38] Notice of Appeal, filed by Nathan Marlow, Mark Risk, Jesse Bernstein, Matthew Danzig, James Jarrett, Seth Baker. REVERSED and REMANDED for further proceedings consistent with this opinion
07/30/2015	44	MANDATE of USCA (12-35946) as to [38] Notice of Appeal, filed by Nathan Marlow, Mark Risk, Jesse Bernstein, Matthew Danzig, James Jarrett, Seth Baker. The judgment of this Court, entered March 18, 2015 and amended July 20, 2015, takes effect this date. This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure. Costs are taxed against the appellee in the amount of $506.20. REVERSED and REMANDED
08/10/2015	45	ORDER VACATING PRIOR ORDER STRIKING CLASS ALLEGATIONS by Judge Ricardo S Martinez

U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 12-80085

SETH BAKER, ET AL.,

v.

MICROSOFT CORPORATION,

RELEVANT DOCKET ENTRIES

DATE	NO.	DOCKET TEXT
04/10/2012	1	PETITION FOR PERMISSION TO APPEAL PURSUANT TO RULE 23(f)
04/23/2012	2	Respondent Microsoft Corporation Answer to 23(f) Petition
06/12/2012	3	Filed order (EDWARD LEAVY and MICHAEL DALY HAWKINS) The court, in its discretion, denies the petition for permission to appeal the district court's March 27, 2012 order. *See* Fed. R. Civ. P. 23(f); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005) (per curiam)

U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 12-35946

SETH BAKER, ET AL.,

v.

MICROSOFT CORPORATION,

RELEVANT DOCKET ENTRIES

DATE	NO.	DOCKET TEXT
12/26/2012	4	Appellee Microsoft Corporation Motion to Dismiss the Case
01/22/2013	7	Appellants Seth Baker, Jesse Bernstein, Matthew Danzig, James Jarrett, Nathan Marlow and Mark Risk Response opposing Motion to Dismiss the Case
02/15/2013	8	Appellee Microsoft Corporation Reply to Response to Motion to Dismiss the Case
03/14/2013	9	Filed order (Appellate Commissioner): Appellee's motion to dismiss this appeal for lack of jurisdiction is denied without prejudice to renewing the arguments in the answering brief

DATE	NO.	DOCKET TEXT
04/22/2013	11	Opening Brief by Appellants Seth Baker, Jesse Bernstein, Matthew Danzig, James Jarrett, Nathan Marlow and Mark Risk
04/23/2013	14	Excerpts of Record by Appellants Seth Baker, Jesse Bernstein, Matthew Danzig, James Jarrett, Nathan Marlow and Mark Risk
04/24/2013	25	Appellants' paper copies of Excerpts of Record [14] in 4 volumes (Vols. 2, 3, 4 FILED UNDER SEAL)
05/22/2013	20	Answering Brief by Appellee Microsoft Corporation
06/24/2013	26	Reply Brief by Appellants Seth Baker, Jesse Bernstein, Matthew Danzig, James Jarrett, Nathan Marlow and Mark Risk
06/25/2013	28	Errata to Reply brief [26] filed by Appellants Seth Baker, Jesse Bernstein, Matthew Danzig, James Jarrett, Nathan Marlow and Mark Risk
09/26/2013	33	Filed clerk order: Appellants' unopposed motion for permission for appellant Jesse Bernstein to dismiss his appeal is granted
03/18/2015	44	FILED OPINION (MICHAEL DALY HAWKINS, JOHNNIE B. RAWLINSON and CARLOS T. BEA) REVERSED AND REMANDED.

DATE	NO.	DOCKET TEXT
		Judge: JBR Authoring, Judge: CTB Concurring. FILED AND ENTERED JUDGMENT
04/01/2015	46	Appellee Microsoft Corporation Petition for Rehearing En Banc
07/20/2015	53	Filed order and amended opinion (MICHAEL DALY HAWKINS, JOHNNIE B. RAWLINSON and CARLOS T. BEA). Microsoft Corporation's Petition for En Banc Rehearing, filed on April 1, 2015, is DENIED. No further petitions for rehearing or rehearing en banc will be accepted. REVERSED AND REMANDED
07/30/2015	54	MANDATE ISSUED. Costs taxed against Appellee in the amount of $506.20

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

[Filed 10/05/2009]

C07-1121-JCC

In Re Microsoft Xbox 360 Scratched Disc Litigation

This order relates to all actions

ORDER

This matter is before the Court on Plaintiffs' motion for class certification and application of Washington law. (Dkt. No. 58). The Court has also considered Defendant's response (Dkt. No. 89), Plaintiffs' reply (Dkt. No. 105, and Defendant's surreply. (Dkt. No. 117). In addition to reviewing the parties' pleadings and attached declarations, exhibits and other submissions, the Court heard oral argument on September 29, 2009.

For the reasons below, the Court hereby DENIES Plaintiffs' motion to certify them as representatives of the proposed Console Owners Class. The Court FURTHER DENIES Plaintiffs' motion to certify them as representatives of the proposed Damaged Disc Subclass.

I. BACKGROUND

This case involves an alleged product defect of Defendant Microsoft Corporation's popular video-

game console, the Xbox 360. Microsoft launched the Xbox in November 2005, and has sold more than ten million of the machines since then. The success of the Xbox is partly the result of the high speeds at which it spins game discs. The Xbox is capable of spinning discs at 7500 rotations per minute, while competing products like the Nintendo Wii and Sony Playstation III spin discs at 3000 to 4000 rotations per minute. Plaintiffs claim that this allows the Xbox to load games more quickly, render smoother graphics, and create a better overall video-gaming experience. (Pl. Mot. 5-6 (Dkt. No. 58)).

Plaintiffs Jose Caraballo, Justin Hanson, Robert Ling III, Christine Moskowitz, Luis Torres and David Wood are Xbox owners from three different states who bought Xbox consoles in 2006 or 2007.[1] Each alleges that he or she was playing a video game when a grinding noise coming from inside the machine caught his or her attention. Each of them ejected the video-game disc and found deep grooves on its readable side.[2] In each case, the game disc had been rendered inoperable. Plaintiffs called Microsoft customer service and asked for a refund of the price of the damaged game discs. In all six cases, Microsoft refused. (Pl. Decls. (Dkt. No. 59-64)). Plaintiffs' experiences are not unique. Microsoft's customer-service department has received approximately 55,000 complaints about scratched game discs. (Pl. Mot. 9 (Dkt. No. 58)).

---

[1] Caraballo is a resident of Pennsylvania; Hanson is a resident of Washington; and Ling, Moskowittz, Torres and Wood are residents of California. (Pl. Decls. (Dkt. No. 59-64)).

[2] In the case of Plaintiff Christine Moskowitz, her son Hunter was actually the principle user of the machine. He was using the machine when it damaged the disc. (Decl. (Dkt. No. 62)).

Plaintiffs allege that the damage occurred because the greater speed at which the Xbox rotates discs exerts greater gyroscopic pressure on the discs—pressure the machine is unable to handle. They allege that the machines had chucked the games discs from the spindle, and then kept trying to spin the chucked discs. Under Plaintiffs' theory, the discs, free from the spindles, wobbled and rubbed against an interior part of the Xbox, which caused the characteristic deep grooves. *(Id.* at 5-7).

Microsoft agrees that this scenario is possible, but argues that it can only occur if a game player misuses the machine by moving it while a disc is spinning inside. Microsoft first learned that the Xbox is capable of chucking game discs from their spindles a few months before the November 2005 product launch. Its engineers studied the problem and determined that the scenario occurred only when users tilted the machine *during* game play. (Def. Opp'n 8-9 (Dkt. No. 89)). Microsoft began the process of placing a warning sticker across the disc-tray mechanism which has a large green exclamation mark and reads: "Do not move console with disc in tray." Because the sticker lays across the disc tray, it is impossible for an owner to use the machine without having first removed the sticker. *(Id.* at 5).The Xbox manual also expressly warns people to "remove discs before moving the console or tilting it between the horizontal and vertical positions." (Pl. Mot. 10-11 (Dkt. No. 58)).

Plaintiffs argue that the Xbox suffers from a fundamental design defect which no warning can cure. The Xbox uses a tray-loading optical-disc drive: Users load game discs onto a slide-out tray, which is then pulled back into the machine. The machine then mounts the disc on a rotating spindle, where it is held

by magnetic force. Plaintiffs argue that the design of the tray-loading drive reflects older technology and that Microsoft should have used a slot-loading drive and a stronger disc holder. They point to the designs of the Microsoft Xbox's two chief competitors: the Sony Playstation III and the Nintendo Wii. Both use a slot-loading drive. And even though both machines spin discs at fewer rotations per minute, their disc holders apply greater force to discs. (Pl. Mot. 5-7 (Dkt. No. 58)) *and* (Sigman Decl. 19-20) (Dkt. No. 65-1)). Plaintiffs argue that Microsoft rejected three possible post-launch solutions to the alleged problem. Microsoft could have increased the magnetic force of the disc holder, slowed the rotation speed of the disc drive, or placed small soft patches inside the machine where the discs were likely to contact the machine parts. (Pl. Mot. 8-9 (Dkt. No. 58)).

Plaintiffs filed this suit in July 2007. In May 2009, they filed this motion, asking the Court to certify them as representatives of two classes: the *Console Owners Class*, which they define to include "all persons residing in the United States who, within four years preceding the filing of Plaintiffs' complaint on July 18, 2007, purchased or were given an Xbox 360 console"; and the *Damaged Disc Subclass*, which includes "all members of the Console Owners Class who purchased or were given Xbox 360 game discs that were subsequently scratched by an Xbox 360 and rendered unusable." (Pl. Mot. 2 (Dkt. No. 58)).

In addition to asking the Court to certify them as representatives of a class and subclass, Plaintiffs argue that this Court should apply the law of Washington State to all their claims, regardless of their different states of residence. If as many as fifty different state laws apply to Plaintiffs' potential class-

action claims, their case is more likely to be so unmanageable as to preclude class certification. *See, e.g., Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001). If, on the other hand, the law of Washington State applies to all claims, regardless of where a particular plaintiff resides, then common issues of law are much more likely to predominate, making class certification a more likely prospect. Because the resolution of the choice-of-law question affects the class-certification analysis, the Court addresses it first. *See Kelley v. Microsoft Corp.*, 251 F.R.D. 544 (W.D. Wash. 2008) (addressing the choice-of-law issue before turning to the question of class-action certification because "[v]ariations in state law affect the Court's analysis . . . under FED. R. CIV. P. 23.").

II. CHOICE OF LAW

The parties agree that Washington law governs this Court's choice-of-law analysis in a diversity case such as this.[3] (Pl. Mot. 28 (Dkt. No. 58)) *and* (Def. Opp'n 28 (Dkt. No. 89)). They disagree about how Washington law applies to a choice-of-law clause contained in the Xbox 360 warranty. The clause reads: "If you acquired the Xbox Product in the United States, the laws of the State of Washington, U.S.A., will apply to this Limited Warranty. *The laws of your state of residence will*

[3] The Court notes that the Due Process Clause of the U.S. Constitution also limits the application of state law in class actions. *See Kelley v. Microsoft Corp.*, 251 F.R.D. 544, 550 (W.D. Wash. 2008). Microsoft declined to argue the constitutional issue. The Court addresses it in passing, and finds that the application of Washington State law is consistent with the U.S. Constitution for many of the same reasons offered by the *Kelley* court. *See Kelley*, 251 F.R.D. at 550 (noting, *inter alia*, that Microsoft is incorporated and has its principal headquarters in Washington).

apply to any tort claims and/or any claims under any consumer protection statutes." (Warranty (Dkt. No. 45 at 29)) (emphasis added). Plaintiffs argue that the Court should refuse to enforce this clause, because "contractual choice-of-law provisions do not dictate the choice of law for tort claims." (Pl. Mot. 34 (Dkt. No. 58)). Defendant, on the other hand, argues that the clause is enforceable as written. (Def. Opp'n. 25-28 (Dkt. No. 89)).

As a general rule, Washington courts abide by contractual choice-of-law and choice-of-forum provisions. *Truck Center Corp. v. General Motors Corp.*, 837 P.2d 631, 634 n.3 (Wash. App. 1992). There is an important exception, however: "A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *Dix v. ICT Group*, 160 P.3d 1016, 1021 (Wash. 2007) (quoting *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)); *see also Rutter v. BX of Tri-Cities, Inc.*, 806 P.2d 1266, 1268 (Wash. App. 1991) ("Washington courts will not give effect to an express choice-of-law clause if the application of the law of the chosen state would be contrary to a fundamental policy of Washington and Washington has a materially greater interest in the determination of the particular issue."). Washington courts have constructed a three-step approach to determining whether to enforce a choice-of-law provision. In *McKee v. AT&T Corp.*, the State Supreme Court stated that courts "disregard the contract provision and apply Washington law if, (1) without the provision, Washington law would apply; (2) the chosen state's law violates a fundamental public policy of Washington; and (3) Washington's interest in the determination outweighs the chosen state's interests."

McKee, 161 P.3d 845, 851 (Wash. 2008) (numbering added). The test is conjunctive: Washington courts invalidate a choice-of-forum clause only if a moving party meets all three requirements. Because this Court finds the issue of public policy dispositive, it does not reach the other issues.

A. Public Policy

Two cases recently decided by the Washington State Supreme Court are particularly instructive: *Dix v. ICT Group*, 161 P.3d 1016 (Wash. 2007), and *McKee v. AT&T Corp.*, 191 P.3d 845 (Wash. 2008). In *Dix*, plaintiffs alleged that ICT Group, a customer-service company working for America Online, Inc. (AOL), had violated the Washington Consumer Protection Act by conspiring with AOL to charge users for unwanted second and third user accounts created under dubious circumstances. Each plaintiff alleged damages of less than one-hundred dollars. *Dix*, 161 P.3d at 1018-19. The trial court dismissed the action because of a forum-selection clause in AOL's standard-form contract which provided:

> You expressly agree that exclusive jurisdiction for any claim or dispute with AOL or relating in any way to your membership or your use of the AOL Services resides in the courts of Virginia and you further agree and expressly consent to the exercise of personal jurisdiction in the courts of Virginia in connection with any dispute including any claim involving AOL or AOL Services.

Id. at 1018. The Washington State Supreme Court reversed, finding that the clause left the plaintiffs and others in their position without an effective remedy because Virginia law foreclosed the class-action

device. *Id.* at 1022. The provision therefore violated a public-policy choice manifested in the CPA: "[Washington State] public policy is violated when a citizen's ability to assert a private right of action [under the CPA] is significantly impaired by a forum selection clause that precludes class actions in circumstances where it is otherwise economically unfeasible for individual consumers to bring their small-value claims." *Id.* at 1024.

In *McKee,* the plaintiff objected that AT&T was improperly charging him municipal telephone taxes for a city in which he did not reside. He filed a lawsuit alleging less than twenty dollars in damages, but noted that "small amounts add up to very large sums." 191 P.3d at 848. AT&T moved to dismiss, relying on a choice-of-law provision in the customer contract which required the application of New York law, as well as another provision which required that all disputes be resolved via arbitration rules that specifically forbade class actions. *Id.* at 849. The trial court refused to enforce the clauses, and the State Supreme Court affirmed, stating that "a forum-selection clause that seriously impairs the plaintiff's ability to go forward on a claim of small value by eliminating class suits in those circumstances where there is no feasible alternative for seeking relief violates public policy and is unenforceable." *Id.* at 852 (citing *Dix,* 161 P.3d at 1022).

At first glance, the cases seem to support Plaintiffs' position. The State Supreme Court held that Washington public policy favors class-action resolution of small claims, and trumps contractual choice-of-forum and choice-of-law provisions. Plaintiffs argue that this ends the inquiry: "Preventing the aggregation of claims such as those asserted here ... is a procedural

device with a substantive effect: as a practical matter, it would shield Microsoft from liability for violating tort and consumer-protection laws." (Reply 16 (Dkt. No. 105)).

This Court finds that a closer reading of the cases, combined with more careful attention to the facts of this case, supports Defendant's position. In *Dix*, AOL's provision would have required Washington residents to litigate in courtrooms on the other side of the country. Microsoft's provision requires no such thing, and in fact subjects Microsoft to liability in the *plaintiff's* most convenient forum, his or her home state. In *McKee*, AT&T's choice-of-law provision would have required that Washington residents hire an attorney familiar with New York law. Microsoft's provision imposes no such burden, and in fact obligates *Microsoft* to familiarize itself with the consumer-protection laws of fifty different states. In short, in both *Dix* and *McKee*, corporate defendants attempted to bind customers to legal rules that specifically foreclosed the possibility of class-action status, and the Washington State Supreme Court found that their attempts offended public policy. Microsoft's choice-of-forum provision, on the other hand, is enforceable, because it leaves open a "feasible alternative for seeking relief." *See McKee*, 191 P.3d at 852. Aggrieved Xbox customers have the option of filing *statewide* class-action suits in their home states. Plaintiffs fail to point to a Washington case holding that the State's public policy is to guarantee *nationwide* class-action resolution of small claims, and this Court does not read *Dix* and *McKee* as stating that much.

Plaintiffs' motion to apply Washington law is DENIED.

III. CLASS-ACTION CERTIFICATION

The analytical framework for class-action certification is clear: The party seeking certification must establish (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998) (describing the requirements of FED. R. CIV. P. 23(a)). Some of the requirements involve similar considerations. *See, e.g., Armstrong v. Davis*, 275 F.3d 849, 868 (2001) (noting that "the commonality and typicality requirements tend to merge into one another"). If potential class representatives meet the four requirements of Rule 23(a), they must then demonstrate that the stated claim for relief falls within one of the three categories outlined in Rule 23(b). In this case, the named plaintiffs argue that their claims meet the requirements of Rule 23(b)(3), which permits class certification where "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3). Throughout the class-action-certification inquiry, the plaintiff bears the burden of proof. *Zinser v. Accufix Research Inst.*, 253 F.3d 1180, 1186 (9th Cir. 2001).

Because the Court finds that Plaintiffs fail to meet the predominance requirement of Rule 23(b)(3), it does not consider the four requirements of Rule 23(a).

A. Predominance

Rule 23(b)(3) permits a class action to be maintained if "the court finds that the questions of law or fact common to class members predominate over any

questions affecting only individual members, and that a class action is superior to other available methods for fairly adjudicating the controversy." FED. R. CIV. P. 23(b)(3). The requirements of Rule 23(b)(3) test "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997). As the Ninth Circuit has stated, "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than an individual basis." *Hanlon*, 150 F.3d at 1022 (internal markings omitted).

Because the choice-of-forum clause in Microsoft's limited warranty is enforceable, individual issues of law predominate over common issues of law. State consumer-protection law varies considerably across the fifty states. As a leading treatise states, "There is no monolithic products-liability law in the United States.... [T]his Balkanization creates enormous confusion when comparing the detailed aspects of the law of one state with that of another." FRUMER & FRIEDMAN, 1 PRODUCTS LIABILITY § 2.01 (1997). This defect alone would justify the Court in denying Plaintiffs' motion for class certification, as the application of fifty different state laws in a single adjudication would create innumerable difficulties. *See Zinser*, 253 F.3d at 1189 ("Where the applicable law derives from the law of the fifty states, as opposed to a unitary federal cause of action, differences in state law will compound the disparities among class members from the different states.").

Individual issues of fact also predominate over common issues of fact. In this context, the Court finds

the reasoning of Judge Andrew Guildford of the Central District of California especially persuasive. In *Gable v. Land Rover N.A., Inc.*, the plaintiffs sought to represent a class of "all current and former owners and lessees of model year 2004, 2005, and 2006 Land Rover LR3s purchased or leased in the state of Michigan." No. CV07-0376, 2008 WL 4441960 (C.D. Cal. 2008). The plaintiffs alleged that *all* of the vehicles suffered a manufacturing defect which caused *some* of the vehicles to wear the tires out unevenly. Plaintiffs alleged that some owners had to purchase new tires too early because of the alleged defect, and argued that Land Rover should bear the cost. The court denied the motion for class certification, in part because individual issues with respect to the factual question of *damages* predominated over common questions. The court noted that many members of the proposed class had not actually experienced the defect. *See id.* at *3 ("Cars and tires have a limited useful life. At the end of their lives they, and whatever defect they may have contained, wind up on a scrap heap. If the defect has not manifested in that time, the buyer has received what he bargained for." (*citing Hicks v. Kaufman & Broad Home Corp.*, 89 Cal. App. 4th 908, 923 (2001))). In addition to finding that individual issues of *damages* predominated over common issues, the court found that individual issues of *causation* predominated over common issues, stating:

> Without individual inquiry, there is no way in adjudicating this case to determine whether the need for a particular repair was based on normal wear, a defective original part, a defective after-market part, environmental factors such as weather or road conditions, the presence of foreign objects in the braking system, the failure of parts other than the

> braking system, poor workmanship by a third party, or individual driving habits.

Id. at *4 (*citing Kia Motors America Corp. v. Yvonne Butler,* No. 3D05-1 1455 (Fla. Dist. Ct. App. 2008)).

This Court is persuaded by the reasoning of Judge Guilford. Plaintiffs have alleged a defect that actually manifests in fewer than one percent of the Xbox consoles sold. In today's era of increasingly sophisticated image rendering, processor speed, and memory storage, many of the millions of satisfied Xbox owners will have replaced their consoles in a few years with a new system that makes the Xbox obsolete by incorporating new technology. The Xbox consoles of those happy customers will have ended up in the video-game console equivalent of the "scrap heap," gathering dust in the basement next to Atari 2600 consoles, Nintendo Entertainment Systems, and Sega Genesis machines.[4] In short, "[i]f the defect has not manifested [during the limited useful life of the Xbox 360], the buyer has received what he bargained for." Individual issues of *damages* therefore preclude the certification of the Console Owners Class.

Individual issues of *causation* also predominate, just as in *Gable.* In *Gable,* some of the plaintiffs' vehicle frames may have distorted because of poor attempts at parallel parking or under-inflated tires. *Gable,* 2008 WL 4441960 at *3. Similar issues of causation arise in this case. Some plaintiffs might have suffered scratched discs because a pet dog, waking from its sleep to see its master playing *Dance Dance Revolution,*

---

[4] The Atari 2600, launched in 1977, was one of the earliest video-game systems. The original Nintendo Entertainment System was launched in 1983, and the Sega Genesis was launched in 1988. All three are now relics.

rushed over to join in the fun, knocking the machine off a shelf in the process. Other discs might have scratched when an overzealous *Guitar Hero* strummed the electronic chords too energetically, unwittingly striking the machine while living his fantasy of rock-stardom.[5] Whether each user's actions constituted misuse, and whether his or her use/misuse caused the damage, would present individual issues of fact for the jury.

Plaintiffs attempt to distinguish *Gable*, but fail. They argue:

> The district court denied class certification on the ground that only a fraction of the proposed class members had actually experienced the defect and because misalignment could have many different causes. Here, in contrast, the design defect appears in every Xbox console sold and the injury linked to the defect—the distinctive deep circular gouges in game discs—can plausibly come from only one cause: the defective Xbox 360 [optical-disc drive] design.

(Pl. Mot. 22 (Dkt. No. 58)). Plaintiffs' argument misses the mark. The *Gable* court acknowledged that every Land Rover suffered the same design flaw, but nonetheless refused to certify the class, because the defect had not *manifested* in every Land Rover. That is exactly the case here. The Xbox 360 may suffer from a design defect, but that defect has not manifested in the vast majority of the machines that have been sold, which means individual issues predominate with

---

[5] *Dance Dance Revolution* and *Guitar Hero* are popular games that require users to dance particular steps and play musical instruments, respectively.

respect to damages. With respect to causation, the *Gable* court left open the possibility that a defective design may have contributed to the premature tire wear. The court simply found that other proximate causes may have conspired to produce that result in different ways in different cases, meaning individual issues of fact predominated. The same is true here: Just as poor parallel-parking skills and under-inflated tires may have caused a pre-existing defect to manifest in different ways, the hypothetical pet dog and guitar hero might have set in motion a chain of causes ending in disc scratching. Even if one link of that chain is a design defect, the other links are unique to each plaintiff and require individual attention. The requirements of individual attention to each plaintiff on issues of law and fact make this case an inappropriate candidate for class-action resolution.

IV. Conclusion

For the foregoing reasons, the Court hereby DENIES Plaintiffs' motion to certify them as representative of the *Console Owners Class* and *Damaged Disc Subclass*. The Court also DENIES Plaintiffs' motion to apply Washington law to their claims.

Dated this 5th day of October, 2009

/s/ John C. Coughenour
JOHN C. COUGHENOUR
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Jan. 21, 2010]

No. 09-80160
D.C. No. 2:07-cv-01121-JCC
Western District of Washington, Seattle

LUIS TORRES, individually and on behalf of all others similarly situated; et al.,

Plaintiffs-Petitioners,

v.

MICROSOFT CORPORATION, a Washington Corporation,

Defendant-Respondent.

ORDER

Before: SILVERMAN and PAEZ, Circuit Judges.

The court, in its discretion, denies the petition for permission to appeal the district court's October 5, 2009 order denying class action certification. *See* Fed. R. Civ. P. 23(f); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005) (per curiam).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. 2:11-cv-00722-RSM

SETH BAKER, JESSE BERNSTEIN, MATTHEW DANZIG, JAMES JARRETT, NATHAN MARLOW, and MARK RISK, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MICROSOFT CORPORATION, a Washington Corporation,

Defendants.

AMENDED COMPLAINT — CLASS ACTION FOR:

1. **BREACH OF EXPRESS WARRANTY;**
2. **BREACH OF IMPLIED WARRANTY;**
3. **VIOLATION OF THE MAGNUSON-MOSS WARRANTY – FEDERAL TRADE COMMISSION IMPROVEMENT ACT, 15 U.S.C. § 2301(3);**
4. **VIOLATION OF CONSUMER PROTECTION LAWS;**
5. **NEGLIGENCE; AND**
6. **STRICT LIABILITY**

JURY TRIAL DEMANDED

SUMMARY OF CLAIMS

1. This is a class action against Microsoft Corporation for Breach of Express Warranty, Breach of Implied Warranty, Violation of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. § 2301(3), violation of the consumer protection laws of the States of California, Illinois, Michigan, New York and Washington, Strict Liability, and, alternatively, Negligence. Plaintiffs bring this action on behalf of themselves and all other persons who own Microsoft Xbox 360 gaming consoles or had Xbox game discs damaged by their Microsoft Xbox 360 gaming consoles. The Xbox 360 plays game discs in an Optical Disc Drive ("ODD") similar to those found in home DVD players and in desktop and notebook personal computers. The Xbox 360 gaming console (variously, the "Xbox 360") is defectively designed because when an Xbox 360 is tilted or swiveled—even slightly—while a game disc is in the ODD, ODD components can contact the game disc, creating a distinctive circular "gouge" on the underside of the disc, rendering it permanently unplayable.

2. A prior proposed class action against Microsoft based on this defect in the Xbox 360 was denied certification based on the decision in *Gable v. Land Rover N. Am., Inc.*, No. CV07-0376, 2008 WL 4441960 (C.D. Cal. Sept. 29, 2008). The decision in *Gable* was reversed on appeal. *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168 (9th Cir. 2010). Relying in part on the Ninth Circuit's decision, Plaintiffs now bring the present proposed class action.

THE PARTIES

3. Plaintiff Seth Baker is an individual resident of Illinois. Plaintiff Baker is the original purchaser and current owner of an Xbox 360 gaming console. Plaintiff Baker brings this action individually and as a class action under rule 23 of the Federal Rules of Civil Procedure on behalf of the Class and Subclasses specified below.

4. Plaintiff Jesse Bernstein is an individual resident of New York. Plaintiff Bernstein is the original purchaser and current owner of an Xbox 360 gaming console. Plaintiff Bernstein brings this action individually and as a class action under rule 23 of the Federal Rules of Civil Procedure on behalf of the Class and Subclasses specified below.

5. Plaintiff Matthew Danzig is an individual resident of California. Plaintiff Danzig is the original purchaser and current owner of an Xbox 360 gaming console. Plaintiff Danzig brings this action individually and as a class action under rule 23 of the Federal Rules of Civil Procedure on behalf of the Class and Subclasses specified below.

6. Plaintiff James Jarrett is an individual resident of California. Plaintiff Jarrett is the original purchaser of two Xbox 360 gaming consoles and the current owner of one. Plaintiff Jarrett brings this action individually and as a class action under rule 23 of the Federal Rules of Civil Procedure on behalf of the Class and Subclasses specified below.

7. Plaintiff Nathan Marlow is an individual resident of Washington. Plaintiff Marlow is the original purchaser and current owner of an Xbox 360 gaming console. Plaintiff Marlow brings this action individually and as a class action under rule 23 of the

Federal Rules of Civil Procedure on behalf of the Class and Subclasses specified below.

8. Plaintiff Mark Risk is an individual resident of Michigan. Plaintiff Risk is the original purchaser and current owner of an Xbox 360 gaming console. Plaintiff Risk brings this action individually and as a class action under rule 23 of the Federal Rules of Civil Procedure on behalf of the Class and Subclasses specified below.

9. Defendant Microsoft is a corporation organized under the laws of the State of Washington, with its principal place of business at One Microsoft Way, Redmond, WA 98052-6399. Microsoft is the manufacturer of the Xbox 360 gaming console and also provides support for the Xbox 360 through the http://www.xbox.com website. Purchasers of the Xbox 360 presumptively include citizens of every state in the United States.

JURISDICTION AND VENUE

10. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(d)(2) in that it is a class action filed under rule 23 of the Federal Rules of Civil Procedure, the matter in controversy, as aggregated pursuant to 28 U.S.C. § 1332(d)(6), exceeds the sum of $5,000,000 exclusive of interest and costs, and a substantial number of members of the class of plaintiffs are citizens of a state different from Microsoft.

11. Venue is proper in the Western District of Washington pursuant to 28 U.S.C. § 1391(a) and (c), in that Microsoft is a Washington corporation with its principal place of business in the Western District of Washington, and Microsoft is subject to personal jurisdiction in the State of Washington.

CLASS ACTION ALLEGATIONS

12. Plaintiffs bring this action as a class action pursuant to Federal Rule of Civil Procedure 23(a), (b)(2), and (b)(3) on behalf of the following Class and Subclasses:[1]

a. Nationwide Console Class on behalf of all persons in the United States who own Microsoft Xbox 360 gaming consoles;

b. Nationwide Damaged Disc Subclass on behalf of all persons in the United States who had game discs damaged by their Microsoft Xbox 360 gaming consoles;

c. State Subclasses as further described below:

i. The California State Subclass on behalf of all persons in California who had game discs damaged by their Microsoft Xbox 360 gaming consoles;

ii. The Illinois State Subclass on behalf of all persons in Illinois who had game discs damaged by their Microsoft Xbox 360 gaming consoles;

iii. The Michigan State Subclass on behalf of all persons in Michigan who had game discs damaged by their Microsoft Xbox 360 gaming consoles;

---

[1] For purposes of these class definitions, "persons . . . who had game discs damaged by their Microsoft Xbox 360 gaming consoles" refers only to those persons whose discs have suffered the distinctive circular scratch caused by the game disc coming in contact with internal components in the ODD of the Xbox 360—damage that causes the game discs' normal functions and operations to be impaired.

iv. The New York State Subclass on behalf of all persons in New York who had game discs damaged by their Microsoft Xbox 360 gaming consoles;

13. Plaintiffs reserve the right to amend class and subclass definitions as litigation proceeds.

14. Excluded from the Proposed Class and Subclasses are officers and directors of Microsoft, members of their immediate families, and each of their legal representatives, heirs, successors or assigns, and any entity in which Microsoft has or has had a controlling interest.

15. This action is properly maintainable as a class action because:

a. The members of the Class and Subclasses for whose benefit this action is brought are dispersed throughout the United States and are so numerous that joinder of all Class and Subclass members is impracticable. While the exact number of Class and Subclass members is unknown to Plaintiffs at this time and can only be ascertained through appropriate discovery, Plaintiffs believe that Class members number in the millions, and that members of each Subclass number in at least the tens of thousands. Members of the Class and Subclasses may be identified from records maintained by Microsoft and may be notified of the pendency of this action by mail, using a form of notice similar to that customarily used in class actions;

b. Plaintiffs share a community of interest with all members of the Class and Subclasses in that:

i. Plaintiffs' claims are typical of those of the Class and Subclasses as all members of the Class and Subclasses are similarly affected by Microsoft's actionable conduct as alleged herein; and

ii. Plaintiffs will fairly and adequately protect the interests of the Class and Subclasses and Plaintiffs have retained counsel competent and experienced in class action litigation in the U.S. District Courts. Plaintiffs have no interests antagonistic to, or in conflict with, the Class and Subclasses that Plaintiffs seek to represent;

c. A class action is superior to other available methods for the fair and efficient adjudication of the claims asserted herein. Because the damages suffered by individual members of the Class and Subclasses may be relatively small, the expense and burden of individual litigation make it virtually impossible for Class and Subclass members to redress the wrongs done to them. The likelihood of individual Class and Subclass members prosecuting separate claims is remote;

d. Microsoft has acted or refused to act on grounds generally applicable to the Class and Subclasses, thereby making appropriate final injunctive relief with respect to the Class and Subclasses as a whole;

e. Plaintiffs anticipate no difficulties in the management of this action as a class action; and

f. The questions of law and fact common to the members of the Class and Subclasses predominate over any questions affecting individual

members of the Class and Subclasses. Among the questions of law and fact common to the Class and Subclasses are:

i. The pervasiveness, propensity and/or likelihood of Xbox 360s damaging game discs and the circumstances in which Xbox 360s damage game discs;

ii. The existence of any express warranties made by Microsoft concerning the Xbox 360;

iii. The application of any such express warranties to the claims asserted in this action;

iv. Whether Microsoft has breached any of its express warranties, as alleged herein;

v. The existence of any implied warranties made by Microsoft concerning the Xbox 360;

vi. The application of any such implied warranties to the claims asserted in this action;

vii. Whether Microsoft has breached any of its implied warranties, as alleged herein;

viii. The application of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. § 2301(3), to the claims asserted in this action;

ix. Whether Microsoft has breached the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, as alleged herein;

x. The application of the consumer protection laws of California, Illinois, Michigan, New York and Washington to the claims of the pertinent Subclasses alleged in this action;

xi. Whether Microsoft has taken adequate measures to prevent damage to game discs placed in Xbox 360s;

xii. Whether Microsoft has taken adequate measures to compensate Class and Subclass members who have had game discs damaged by their Xbox 360s;

xiii. Whether Microsoft breached any of the consumer protection laws of California, Illinois, Michigan, New York and Washington;

xiv. Whether Microsoft's marketing and sales of Xbox 360s which it knows can damage game discs during anticipated normal use is an "unfair or deceptive act or practice" under the consumer protection laws of California, Illinois, Michigan, New York and Washington, as asserted herein;

xv. Whether Microsoft is strictly liable to the Nationwide Class and Subclass, as alleged herein;

xvi. If no express or implied covenants exist between Microsoft and the Class and Subclasses, whether Microsoft was negligent in selling Xbox 360s which can damage game discs, CDs and DVDs; and

xvii. To what extent the members of the Class and Subclasses have sustained injury and the proper measure of compensation.

SUBSTANTIVE ALLEGATIONS COMMON TO ALL COUNTS

The Xbox 360

16. The Xbox 360 is Microsoft's latest video game console and was the first of the most advanced generation of game consoles. The Xbox 360 competes with Sony's PlayStation 3 and Nintendo's Wii. There are now six different configurations of the Xbox 360 that have been sold to the public—the Xbox 360 S, the Xbox 360 Premium 60GB, the Xbox 360 Arcade, the Xbox 360 Elite, the Xbox 360 Pro/Premium 20GB and the Xbox 360 Core System. The suggested retail price for the Xbox 360 has ranged from $479.99 for the Elite to $149 for the Arcade. On information and belief, more than 50 million Xbox 360s have been sold worldwide.

17. All Xbox 360s include a built-in ODD which is used to play game discs licensed by Microsoft for the Xbox 360 and select backward-compatible games made for the original Xbox system.

18. Games for the Xbox 360 retail at various prices between $29.99 and $59.99 with almost all new titles being initially priced at $59.99. Although all games for the Xbox 360 are licensed by Microsoft, the games are published by many different companies in addition to Microsoft itself. On information and belief, Microsoft itself is not the largest single publisher of Xbox games.

19. In addition to games, the Xbox 360's ODD can also play a range of optical media such as audio CDs and DVDs.

20. Xbox 360s are intended for use in the home and are depicted in Microsoft sales literature as sitting on

the floor near a television or resting on an ordinary shelf within a bookcase or home entertainment center.

21. Microsoft's television commercials often depict users engaging in spirited movements as they enthusiastically play games which simulate, among other activities, athletic competition (e.g., "2010 FIFA World Cup South Africa"), infantry warfare (e.g., "Call of Duty") or live rock music performance (e.g., "Guitar Hero").

22. Microsoft has recently launched the "Kinect," a peripheral device for the Xbox 360 which tracks body movements and allows users to control games though their own movements in space. Microsoft's campaign for the Kinect advises users to "Simply jump in."

23. Since the introduction of the Xbox 360, Microsoft has received multiple complaints that the Xbox 360 scratches game discs. These scratches can prevent the discs from functioning properly and, in many cases, the Xbox 360 scratches the discs so severely as to render them unusable. The scratch in question is a distinctive circular scratch which prevents data on the disc from being read by the ODD.

24. The scratches in question are caused by small movements of the Xbox 360 which cause rotating game discs to become decoupled from the ODD spindle and then crash into internal ODD components.

25. Because CD and DVD media supported by ODDs are robust, ODDs are found in numerous consumer products where they are routinely subjected to high levels of tilt, swivel, and vibration. For example, ODDs are found in automobile CD and DVD players, notebook computers, portable DVD players, and digital video camera/recorders ("camcorders"). Sony introduced a portable CD player called the

"Discman" in 1984, which was designed to play CDs while users walked, ran, or bicycled. Portable CD players of this type are still sold and commonly used today.

26. Although these consumer-operated CDs and DVDs are routinely subjected to tilting and movement while operating, none of the media played in these consumer products have experienced widespread disc scratching problems. Industry engineers have long anticipated this problem and have learned to provide simple, inexpensive and obvious measures to protect optical discs in consumer applications while the ODD is in use and the disc is spinning. As a result, there is a reasonable consumer expectation that consumer products with ODDs will not cause media discs to be scratched even when the products are tilted, vibrated, or slightly rotated in the course of expected everyday use.

27. The ODD in the Xbox 360, however, is unable to withstand even the smallest of movements, including the minute unintentional movements to which it is reasonably expected all consumer devices will be subjected when placed in an ordinary household environment due to vibrations or other sources of indirect force being applied to the Xbox 360.

28. The printed user instruction materials packaged with the Xbox 360 do not indicate anywhere that the Xbox 360 can scratch discs due to even the smallest of movements, including the minute unintentional movements to which it is reasonably expected all consumer devices will be subjected when placed in an ordinary household environment due to vibrations or other sources of indirect force being applied to the Xbox 360.

29. The printed user instruction materials packaged with the Xbox 360 do not caution users to place their consoles on any special type of platform designed to isolate the console from vibrations or other sources of indirect force during normal use.

30. Despite the complaints it has received from consumers about the circular scratches to game discs, Microsoft has publicly denied the problem and has claimed that the game discs were being damaged due to deliberate movement of the Xbox 360 while the discs were being played.

31. Microsoft has refused to recall the Xbox 360 to repair the problem with the ODD and, with limited exceptions, has refused to provide compensation to Class and Subclass members whose game discs were damaged by the Xbox 360 ODD.

32. The design of the Xbox 360 ODD was developed in the State of Washington, and it was from or in the State of Washington that Microsoft has made decisions, received complaints, and issued communications about the Xbox 360 and the Xbox 360's ODD design.

The Disc Replacement Program

33. On or about April 2007, Microsoft began a limited disc replacement program (the "disc replacement program") wherein it offered to replace damaged game discs. The disc replacement program is, however, limited to "games where Microsoft is the publisher." According to Microsoft's xbox.com website, as of April 7, 2011, only the following games were available for disc replacement.

* Alan Wake

* Banjo Kazooie: Nuts & Bolts

* Crackdown 2
* Dance Central
* Fable II
* Fable III
* Forza Motorsport 2
* Forza Motorsport 3
* Gears of War
* Gears of War 2
* Halo 2
* Halo 3
* Halo 3: ODST
* Halo: Reach
* Halo Wars
* Kinectimals
* Kinect Adventures!
* Kinect Joy Ride
* Kinect Sports
* Lost Odyssey
* Ninja Gaiden 2
* Project Gotham Racing 4
* Scene It? Box Office Smash
* Viva Piñata
* Viva Piñata: Trouble In Paradise
* Xbox 360 triple pack

34. The disc replacement program does not provide for replacement without charge for damaged discs;

rather, Microsoft charges $20.00 to U.S. customers for disc replacement and the replacement consists of "the game disc only, without case or game documents."

35. Since the cost to press and ship a replacement game disc is significantly less than a dollar, Microsoft is deriving a profit of $19.00 or more on each disc it replaces under its disc replacement program.

36. The disc replacement program provides no relief to those users of Xbox 360s whose games discs were damaged by the Xbox 360 but are not available for disc replacement.

37. The disc replacement program was conceived, begun and implemented from Microsoft headquarters in the State of Washington.

The Plaintiffs

Plaintiff Baker

38. In or about November 2007, plaintiff Baker purchased an Xbox 360 from Amazon.com and the console was then delivered to his residence.

39. In or about November 2009, plaintiff Baker purchased an Xbox 360 game titled "Call of Duty: Modern Warfare 2." The game was then scratched by the Xbox 360, through no fault of Baker's own, at Baker's residence in Illinois. The scratches on plaintiff Baker's game disc caused his Xbox 360 to freeze and prevent individual profiles from being saved when using the game disc. The scratches also rendered his game disc useless and permanently unplayable.

Plaintiff Bernstein

40. Within the past two years, Plaintiff Bernstein purchased an Xbox 360 within the state of New York.

41. Subsequent to that purchase, plaintiff Bernstein purchased an Xbox 360 game titled "Tom Clancy's Rainbow Six: Vegas." The game was then scratched by the Xbox 360 in Bernstein's residence in New York through no fault of Bernstein's own. The scratches on plaintiff Bernstein's game disc caused his Xbox 360 to freeze and prevent individual profiles from being saved when using the game disc. The scratches also rendered his game disc useless and permanently unplayable.

Plaintiff Danzig

42. In or about November 2006, plaintiff Danzig purchased an Xbox 360 from a Micro Center store within the state of California.

43. Between November 2006 and May 2008, plaintiff Danzig purchased various Xbox 360 games, including "Grand Theft Auto IV," "Madden NFL 07," "Madden NFL 08," and "Gears of War."

44. Each of these four games was then scratched by the Xbox 360 in Danzig's residence in California through no fault of Danzig's own. The scratches on plaintiff Danzig's game discs caused his Xbox 360 to freeze and prevent individual profiles from being saved when using the game discs. The scratches also rendered his game discs useless and permanently unplayable.

Plaintiff Jarrett

45. In or about December 2007, plaintiff Jarrett purchased an Xbox 360 from a retailer in Concord, California. He and his son were the primary users of this machine.

46. Beginning in the early months of 2008, Jarrett purchased game discs in Cocord, California to play on his machine.

47. Likewise beginning in the early months of 2008, at least three of the game discs that Jarrett purchased to play on his Xbox 360 were scratched by this machine in Jarrett's residence in California through no fault of Jarrett's (or his son's) own. The scratches on these discs caused Jarrett's Xbox 360 to freeze and prevent individual profiles form being saved when using the game disc. The scratches also rendered the game discs useless and permanently unplayable.

48. In January 2008, Jarrett called Microsoft Tech Support to inform the company of his scratched game disc for "Rock Band I"—one of the games he had purchased—and to seek a replacement disc. Microsoft told him that there was nothing wrong with his machine and that he should simply return the disc to the store where it was purchased. Microsoft never replaced the game disc or reimbursed him for its cost.

49. After the Xbox 360 Jarrett had purchased in or about December 2007 had scratched three disks, he decided to purchase another Xbox 360. Jarrett thought that the scratches that he was suffering were a problem unique to that one machine. He did not believe the problem would manifest itself again in a new machine.

50. Thus, at the end of 2009, he purchased another Xbox 360 from Toys "R" Us in Concord, California.

51. This second machine, however, had the same defects as the first. From the time of purchase through the autumn of 2010, at least five of the game discs that Jarrett purchased to play on his Xbox 360 were scratched by this machine in Jarrett's residence in

California through no fault of Jarrett's (or his son's) own. The scratches on these discs caused Jarrett's Xbox 360 to freeze and prevent individual profiles form being saved when using the game disc. The scratches also rendered the game discs useless and permanently unplayable.

Plaintiff Marlow

52. On or about September 15, 2007, plaintiff Marlow purchased an Xbox 360 from a Game Stop store within the state of Washington.

53. On or about December 2008, plaintiff Marlow purchased an Xbox 360 game titled "Gears of War 2." The game was then scratched by the Xbox 360 in Marlow's residence in Washington through no fault of Marlow's own. The scratches on his game disc caused his Xbox 360 to freeze and prevent individual profiles from being saved when using the game disc. The scratches also rendered plaintiff Marlow's game disc useless and permanently unplayable.

Plaintiff Risk

54. In or about November 2010, plaintiff Risk purchased an Xbox 360 from a Sam's Club store within the state of Michigan.

55. In or about November 2010, plaintiff Risk exchanged his first Xbox 360 with a brand new Xbox 360 at Sam's Club, due to the scratched game disc problem.

56. In or about November 2010, plaintiff Risk purchased Xbox 360 games including "Fallout: New Vegas" and "Tiger Woods PGA Tour 11."

57. Both of these games were scratched by the Xbox 360 through no fault of Risk's own. The scratches on plaintiff Risk's game discs caused his Xbox 360 to

freeze and prevent individual profiles from being saved when using the game discs. The scratches also rendered his game discs useless and permanently unplayable.

58. In or about November 2010, plaintiff Risk contacted Microsoft Tech Support who instructed him to test the Xbox 360 by inserting another game disc in it. Upon following these instructions, the Xbox 360 rendered that game disc unreadable through no fault of Risk's own. In or about November 2010, plaintiff Risk contacted Microsoft Tech Support again. Once again, Microsoft instructed plaintiff to test his Xbox 360 machine by inserting another disc into it. As before, the Xbox 360 rendered the new disc unreadable through no fault of Risk's own.

59. Microsoft Tech Support then told plaintiff Risk about their Disc Replacement Program. However, they refused to replace his game discs because they were manufactured by third party entities, and not by Microsoft.

60. Microsoft never replaced plaintiff Risk's damaged game discs or reimbursed him for the cost of those discs.

FIRST CAUSE OF ACTION

BREACH OF EXPRESS WARRANTY

(Asserted on behalf of the Nationwide Console Class)

61. Plaintiffs re-allege the preceding paragraphs as if set forth here.

62. Defendants have an Agreement with the Class known as the "Product Warranty: Xbox 360 Video Game and Entertainment System" (the "Express Warranty"). The Express Warranty provides:

> One Year Express Warranty on Console. Subject to the terms and conditions of this Limited Warranty, Microsoft warrants to you only (the original retail purchaser) that, during the Warranty Period and under normal use and service, the Xbox® Console will substantially conform to the printed user instruction materials packaged with the Console.

63. The Express Warranty further provides: "If you acquired the Xbox Product in the United States, the laws of the State of Washington, U.S.A., will apply to this Limited Warranty."

64. The Express Warranty seeks to limit Microsoft's liability, disclaim any warranties and limit the Class's remedies. However, these limitations and disclaimers are unenforceable under Washington law because they are procedurally unconscionable in that the limitations and disclaimers are not specifically negotiated between defendants and each member of the Class.

65. Further, the limitations and disclaimers contained in the Express Warranty are unenforceable under Washington law as substantively unconscionable in that the limited remedy provided to the Class under the Express Warranty fails of its essential purpose because it deprives the Class of the substantive value of its bargain due to an undiscoverable defect.

66. Microsoft's conduct in selling and marketing Xbox 360s with ODDs that damage game discs under normal use and Microsoft's failure to repair or replace all Xbox 360s with defective ODDs is a breach of the terms of the Express Warranty as well as Microsoft's obligation of good faith and fair dealing.

67. As a direct and proximate result of Microsoft's breach of the Express Warranty, plaintiffs and the Class have been damaged in an amount to be determined at trial but in excess of an aggregate amount of $5,000,000.

68. Plaintiffs and the Class are also entitled to declaratory and injunctive relief requiring Microsoft to repair or replace all Xbox 360 DVD drives which have been damaged or which threaten to damage discs inserted in them.

69. Affording Microsoft a reasonable opportunity to cure its breach of express warranty would be unnecessary and futile. At the time of sale of the Xbox 360, Microsoft should have known, or was reckless in not knowing of the Xbox 360's defects, but nonetheless failed to rectify the situation and/or disclose the defects. Under the circumstances, affording Microsoft notice and a reasonable opportunity to cure its breach of warranty is excused and thereby deemed satisfied.

70. In the alternative, Plaintiffs' prior complaints against Microsoft suffice to give Microsoft notice and an opportunity to cure, however Microsoft has failed to cure the breaches of implied warranty.

71. In the alternative, Plaintiffs and the Class provided Microsoft with notice of their and the putative Class members' warranty claims by virtue of the letter sent to Microsoft on February 18, 2011, a copy of which is attached hereto as Exhibit A.

SECOND CAUSE OF ACTION

BREACH OF IMPLIED WARRANTY

(Asserted on behalf of the Nationwide Console Class)

72. Plaintiffs re-allege the preceding paragraphs as if set forth here.

73. Defendants have an Agreement with the Class known as the "Implied Warranty: Xbox 360 Video Game and Entertainment System" (the "Implied Warranty"). The Implied Warranty provides:

> Implied Warranty. You may also have an implied warranty and/or condition under the laws of some jurisdictions, which is hereby limited to the duration of the Warranty Period. Some jurisdictions do not allow limitations on how long an implied warranty or condition lasts, so the foregoing limitation may not apply to you.

74. The Uniform Commercial Code § 2-314 provides that, unless excluded or modified, a warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Microsoft marketed, promoted, manufactured and/or sold the Xbox 360 and placed it into the stream of commerce, and thus privity exists between Plaintiffs and Microsoft. Microsoft knew or had reason to know of the ordinary use for which the Xbox 360 was purchased, and impliedly warranted that the Xbox 360 was of merchantable quality and fit for such use as other consumer electronic devices. Contrary to these representations, the Xbox 360 is defective in that the Xbox 360's ODD can damage game discs under normal use.

75. At all times, the states listed below, including the District of Columbia, have codified and adopted the provisions of the Uniform Commercial Code governing the implied warranty of merchantability: Ala. Code § 7-2-314; Alaska Stat. § 45.02.314; Ariz. Rev. Stat. § 47-2314; Ark. Code § 4-2-314; Cal. Com. Code § 2314; Colo. Rev. St § 4-2-314; Conn. Gen. Stat. § 42a-2-314; 6 Del. C. § 2-314; D.C. Code § 28:2-314;

Fla. Stat. § 672.314; Ga. Code § 11-2-314; Haw. Rev. Stat. § 490:2-314; Idaho Code § 28-2-314; 810 Ill. Comp. Stat. 5/2-314; Ind. Code § 26-1-2-314; Iowa Code § 554.2314; Kan. Stat. § 84-2-314; Ky. Rev. Stat. § 355.2-314; La. Civ. Code art. § 2520; 11 Me. Rev. Stat. § 2-314; Md. Code § 2-314; Mass. Gen. Laws Ch. 106 § 2-314; Mich. Comp. Laws § 440.2314; Minn. Stat. § 336.2-314; Miss. Code § 75-2-314; Mo. Rev. Stat. § 400.2-314; Mont. Code § 30-2-314; Neb. Rev. Stat. U.C.C. § 2-314; Nev. Rev. Stat. U.C.C § 104.2314; N.H. Rev. § 382-A:2-314; N.J. Stat. § 12A:2-314; N.M. Stat. § 55-2-314; N.Y. U.C.C. Law § 2-314; N.C. Gen. Stat. § 25-2-314; N.D. Stat § 41-[illegible]-314; Ohio Rev. Code § 1302.27; Okla. Stat. tit. 12A § 2-314; Or. Rev. Stat. § 72.3140; 13 Pa. Stat. § 2314; R.I. Gen. Laws § 6A-2-314; S.C. Code § 36-2-314; S.D. Stat. § 57A-2-314; Tenn. Code § 47-2-314; Tex. Bus. & Com. Code § 2-314; Utah Code § 70A-2-314; Va. Code § 8.2-314; Vt. Stat. 9A § 2-314; W. Va. Code § 46-2-314; Wash. Rev. Code § 62A 2-314; Wis. Stat. § 402.314; and Wyo. Stat. § 34.1-2-314.

76. As designers, manufacturers, producers, marketers and/or sellers of the Xbox 360, Microsoft is a "merchant" within the meaning of the various states' commercial codes governing the implied warranty of merchantability.

77. Microsoft designed, manufactured, distributed, marketed and/or sold the Xbox 360 and represented to Plaintiffs and other members of the Nationwide Console Class that it was of merchantable quality and fit for use as a gaming console.

78. The Xbox 360 is a "good," as defined in the various states' commercial codes governing the implied warranty of merchantability.

79. As merchants of the Xbox 360, Microsoft knew that purchasers relied upon it to design, manufacture and/or sell Xbox 360s that would not damage game discs during normal use.

80. Microsoft designed, manufactured and/or sold Xbox 360s to consumers, and they knew that such products would be used by consumers in a home environment where minor shocks and vibrations are routinely administered to consumer products during the course of normal use and are not expected to result in damage to game discs.

81. At the time that Microsoft designed, manufactured, sold and/or distributed the Xbox 360, Microsoft knew the purpose for which the product was intended and impliedly warranted that the product was of merchantable quality; was free of design defects; and was safe and fit for its ordinary purpose—as a device that played Xbox video game discs.

82. Microsoft breached its implied warranties in connection with the sale of the Xbox 360 to Plaintiffs and the other members of the Nationwide Console Class. The Xbox 360 was and is not safe and fit for its ordinary purposes which involve playing Xbox video game discs. It was and is not free of defects, as evidenced by the scratching of game discs during normal use of the Xbox 360.

83. Affording Microsoft a reasonable opportunity to cure its breaches of warranties would be unnecessary and futile. At the time of sale of the Xbox 360, Microsoft should have known, or was reckless in not knowing of the Xbox 360's lack of merchantability and unfitness for ordinary use, but nonetheless failed to rectify the situation and/or disclose the defects. Under the circumstances, affording Microsoft notice and a

reasonable opportunity to cure its breach of warranties is excused and thereby deemed satisfied.

84. In the alternative, certain of Plaintiffs' prior complaints to Microsoft suffice to give Microsoft notice and an opportunity to cure, but Microsoft has failed to cure the breaches of implied warranty.

85. In the alternative, the Class provided Microsoft with notice of their and the putative Class members' warranty claims by virtue of the letter sent to Microsoft on February 18, 2011, a copy of which is attached hereto as Exhibit A.

86. As a direct and proximate result of Microsoft's breach of implied warranties, Plaintiffs and other members of the Nationwide Console Class are entitled to damages available under applicable law, including, but not limited to, the purchase price of the Xbox 360 and the replacement of any game discs damaged by the Xbox 360.

THIRD CAUSE OF ACTION

VIOLATION OF THE MAGNUSON-MOSS WARRANTY-FEDERAL TRADE COMMISSION IMPROVEMENT ACT

(15 U.S.C. §§ 2301 *et seq.*)

(Asserted on behalf of the Nationwide Console Class)

87. Plaintiffs re-allege the preceding paragraphs as if set forth here.

88. Plaintiffs assert this cause of action on behalf of themselves and all other members of the Nationwide Console Class.

89. Plaintiffs are "consumers" within the meaning of the Magnuson-Moss Warranty—Federal Trade

Commission Improvement Act, 15 U.S.C. § 2301(3) ("Magnuson-Moss Warranty Act").

90. Microsoft is a "supplier" and "warrantor" within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(4)-(5).

91. The Xbox 360 is a "consumer product" within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(1).

92. As set forth more fully in the Second Cause of Action, Microsoft sold Xbox 360s subject to the implied warranty of merchantability in the jurisdictions listed in the Second Cause of Action, which is an "implied warranty" within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(7). Microsoft breached its implied warranty of merchantability by selling Xbox 360s that were defective in that they scratched game discs during normal use and were unsafe for use as video game consoles. The Xbox 360s were not safe and fit for their ordinary purposes which involved the playing of Xbox video game discs. They were not free of defects, as evidenced by the scratching of game discs experienced by thousands of users during normal use.

93. The amount in controversy of Plaintiffs' individual claims meets or exceeds the sum of $25. The amount in controversy of this action exceeds the sum of $50,000, exclusive of interest and costs, computed on the basis of all claims to be determined in this lawsuit.

94. Affording Microsoft a reasonable opportunity to cure its breaches of warranties would be unnecessary and futile. At the time of sale of the Xbox 360, Microsoft should have known or was reckless in not knowing of the Xbox 360's lack of merchantability and unfitness for ordinary use, but nonetheless failed to

rectify the situation and/or disclose the defects. Under the circumstances, affording Microsoft notice and a reasonable opportunity to cure its breach of warranties is excused and thereby deemed satisfied.

95. In the alternative, certain of Plaintiffs' prior complaints to Microsoft suffice to give Microsoft notice and an opportunity to cure, however Microsoft has failed to cure the breaches of implied warranty.

96. In the alternative, the Class provided Microsoft with notice of their and the putative Class members' warranty claims by virtue of a letter sent to Microsoft on February 18, 2011, a copy of which is attached hereto as Exhibit A.

97. As a direct and proximate result of Microsoft's breach of implied warranties and consequent violations of the Magnuson-Moss Warranty Act, Plaintiffs and other members of the Nationwide Console Class are entitled to damages available under applicable law, including, but not limited to, the purchase price of the Xbox 360 and replacement of all game discs damaged during normal use.

FOURTH CAUSE OF ACTION

VIOLATION OF THE CALIFORNIA UNFAIR COMPETITION LAW "UCL"

(Cal. Bus. & Prof. Code §§ 17200 *et seq.*)

(Asserted on behalf of the California State Subclass)

98. Plaintiffs re-allege the preceding paragraphs as if fully set forth herein.

99. Plaintiffs Danzig and Jarrett assert this cause of action on behalf of themselves and other members of the California State Subclass.

100. California Business and Professions Code § 17200 prohibits any "unfair, deceptive, untrue or misleading advertising." For the reasons set forth above, Microsoft engaged in unfair, deceptive, untrue and misleading advertising in violation of California Business and Professions Code § 17200, in that Defendants' omissions in their representations and advertising were likely to deceive the public as to the safety of the Xbox 360.

101. Microsoft has engaged in unfair and unlawful business practices in two independent manners: (1) marketing and selling the Xbox 360 with design and/or manufacturing defects that had the capacity to and, in many cases, did actually cause damage to game discs during ordinary and expected use; and (2) omitting to inform consumers of these defects and risks.

102. Microsoft omitted to inform consumers that the Xbox 360 has a design and/or manufacturing defect and that the defect had the capacity to and, in many cases, did actually cause damage to game discs during ordinary and expected use for the purpose of inducing Plaintiffs Danzig and Jarrett and the other members of the California State Subclass to purchase the Xbox 360.

103. The facts omitted by Microsoft to Plaintiffs Danzig and Jarrett and the other members of the California State Subclass are material facts that a reasonable person would have considered important in deciding whether or not to purchase and/or use the Xbox 360.

104. Plaintiffs Danzig and Jarrett and the other members of the California State Subclass justifiably acted or relied to their detriment on the undisclosed

facts as evidenced by their purchase and/or use of defective Xbox 360s.

105. Had Plaintiffs Danzig and Jarrett and the other members of the California State Subclass known of the design defect, they would not have purchased and/or used the Xbox 360.

106. By engaging in the above-described acts and practices, Microsoft has committed one or more acts of unfair competition within the meaning of Business and Professions Code § 17200.

107. Microsoft's acts and practices have deceived and/or are likely to deceive members of the consuming public and members of the California State Subclass.

108. Microsoft sold Plaintiff Danzig and Jarrett and the other members of the California State Subclass and other consumers Xbox 360s with defects that have rendered the Xbox 360s unusable for the purpose for which they were sold.

109. The injury to consumers by this conduct is greatly outweighed by any alleged countervailing benefit to consumers or competition under all of the circumstances. Moreover, because it was Microsoft alone that was in a position to know of the defects, the injury is not one that Plaintiffs Danzig and Jarrett and the other members of the California State Subclass could have reasonably avoided.

110. Microsoft's acts and practices are unfair and unlawful because they violate California Civil Code §§ 1709 and 1710, California Commercial Code § 2313, and the common law.

111. Plaintiffs Danzig and Jarrett and the other members of the California State Subclass suffered an injury in fact and lost money and property as a direct

and proximate result of Microsoft's violations of the foregoing California statutes.

112. Plaintiffs Danzig and Jarrett and the other members of the California State Subclass have been damaged and are entitled to all of the damages, remedies, fees, and costs available under Business and Professions Code §§ 17200 *et seq*.

113. Plaintiffs Danzig and/or Jarrett and the other members of the California State Subclass will provide or have already provided any required notice to appropriate entities regarding Microsoft's unfair, unlawful and deceptive trade practices.

FIFTH CAUSE OF ACTION

VIOLATION OF THE CALIFORNIA CONSUMERS LEGAL REMEDIES ACT "CLRA"

(Cal. Civ. Code §§ 1750 *et seq*.)

(Asserted on behalf of the California State Subclass)

114. Plaintiffs re-allege the preceding paragraphs as if fully set forth herein.

115. Plaintiffs Danzig and Jarrett assert this cause of action on behalf of themselves and other members of the California State Subclass.

116. This claim arises under the California Consumer Legal Remedies Act, California Civil Code §§ 1750 *et seq*.

117. At all relevant times, Jarrett, Danzig and the other members of the California State Subclass were "consumers" as that term is defined in California Civil Code § 1761(d).

118. At all relevant times Xbox 360s constituted "goods" as that term is defined in California Civil Code § 1761(a).

119. At all relevant times, Microsoft constituted a "person" as that term is defined in California Civil Code § 1761(c).

120. The purchase of Xbox 360s by Plaintiffs Danzig and Jarrett and the other members of the California State Subclass constituted "transactions" as that term is defined in California Civil Code § 1761(e).

121. At all relevant times, Microsoft provided "services" to Plaintiffs Danzig and Jarrett and the other members of the California State Subclass within the meaning of California Civil Code § 1761(b).

122. The CLRA provides in relevant part that the

> following methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful: (5) representing that goods . . . have . . . approval, characteristics, uses, benefits . . . which they do not have; . . . (7) Representing that goods . . . are of a particular standard, quality or grade . . . if they are of another.

Cal. Civ. Code § 1770(a)(5), (7).

123. Microsoft made uniform representations that the Xbox 360 was an advanced gaming console that would perform as represented and was an appropriate player of Xbox game discs.

124. But Microsoft omitted to inform consumers that the Xbox 360 has a design and/or manufacturing defect and that the design defect had the capacity to

and, in many cases, did actually damage game discs during normal and expected use for the purpose of inducing Plaintiffs Danzig and Jarrett and the other members of the California State Subclass to purchase Xbox 360s.

125. It was Microsoft alone that was in a position to know that the Xbox 360s have a defect and that the defect had the capacity to and, in many cases, did actually damage game discs during normal and expected use. These facts were not known to Plaintiffs Danzig and Jarrett and the other members of the California State Subclass. Microsoft's exclusive access to these material facts gave rise to a duty to disclose such facts, which it failed to perform.

126. The facts omitted by Microsoft to Plaintiffs Danzig and Jarrett and the other members of the California State Subclass are material facts that a reasonable person would have considered important in deciding whether or not to purchase Xbox 360.

127. Plaintiffs Danzig and Jarrett and the other members of the California State Subclass justifiably acted or relied to their detriment on the undisclosed facts as evidenced by their purchase and/or use of the defective Xbox 360.

128. Had Plaintiffs Danzig and Jarrett and the other members of the California State Subclass known that the Xbox 360 defect had the capacity to and, in many cases, did actually damage game discs during normal and expected use they would not have purchased and/or used the Xbox 360.

129. As a direct and proximate result of Microsoft's violations of the foregoing laws, Plaintiffs Danzig and Jarrett and the other members of the California State Subclass have been injured.

130. The California State Subclass has been damaged and is entitled to all of the damages, remedies, fees, and costs available under California Civil Code § 1780.

131. In accordance with California Civil Code § 1782(a), on February 18, 2011, Plaintiff's counsel served Microsoft with notice of its alleged violations of the CLRA by certified mail, return receipt requested. A true and correct copy of that notice is attached hereto as Exhibit A.

132. On March 23, 2011, Microsoft replied in a letter (attached hereto as Exhibit B), which refused to provide appropriate correction, repair, replacement, or other remedy.

SIXTH CAUSE OF ACTION

VIOLATION OF THE ILLINOIS CONSUMER FRAUD ACT ("ICFA")

(815 Ill. Comp. Stat. 505/1 et seq.)

(Asserted on behalf of the Illinois State Subclass)

133. Plaintiffs re-allege the preceding paragraphs as if set forth fully herein.

134. Plaintiff Seth Baker asserts this cause of action on behalf of himself and all other members of the Illinois State Subclass.

135. The ICFA is codified at 815 Ill. Comp. Stat. 505/1 *et seq.* The ICFA provides consumers with a comprehensive procedure for redressing the violations of applicable law. Accordingly, the conduct at issue in this case falls within the scope of the ICFA.

136. Plaintiff Seth Baker and other members of the Illinois State Subclass are "consumers" within the meaning of the ICFA.

137. Microsoft engaged in trade and/or commerce within the meaning of the ICFA.

138. The ICFA provides that

> Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby.

815 Ill. Comp. Stat. 505/2.

139. The ICFA further provides a private right of action to any person "who suffers actual damage as a result of a violation of this Act committed by any other person." 815 Ill. Comp. Stat. 505/10a.

140. Microsoft has a statutory duty to refrain from unfair acts or practices in the design, development, promotion, sale and/or manufacture of the Xbox 360.

141. Microsoft omitted to inform consumers that the Xbox 360 has a design and/or manufacturing defect and that the design defect had the capacity to and, in many cases, did actually damage game discs during normal and expected use for the purpose of inducing Plaintiffs Baker and the other members of the Illinois State Subclass to purchase Xbox 360s.

142. It was Microsoft alone that was in a position to know that the Xbox 360s have defects and that the defects had the capacity to and, in many cases, did actually damage game discs during normal and expected use, facts not known to Plaintiff Baker and the other members of the Illinois State Subclass. Microsoft's exclusive access to these material facts gave rise to a duty to disclose such facts to Plaintiff Baker and the other members of the Illinois State Subclass, which Microsoft failed to perform.

143. Further, Microsoft compounded these unfair acts by instituting their limited disc replacement program. Microsoft offered to replace game discs that its own undisclosed defects had permanently damaged—but only for games that Microsoft itself had published, and only for a $20.00 charge.

144. Microsoft committed these unfair practices as defined by 815 Ill. Comp. Stat. 505/2, with the intent to induce Plaintiff Baker and the other members of the Illinois State Subclass to rely on those unfair practices in deciding to purchase and use Xbox 360s. Microsoft committed those unfair practices during the course and conduct involving trade and commerce. 815 Ill. Comp. Stat. 505/2.

145. These practices offend public policy, are unethical, oppressive and unscrupulous, and cause substantial injury to consumers.

146. The unfair practices were carried out through sales literature, including internet advertising; through replacements or failures to replace damaged disks; and though sales of products bearing the Xbox 360 logo on the internet and at various stores in Illinois.

147. As a direct and proximate result of Microsoft's unfair practices in violation of the ICFA, Plaintiff Baker and the other members of the Illinois State Subclass have been injured.

148. Plaintiff Baker and the members of the Illinois State Subclass have been damaged and are entitled to all of the damages, remedies, fees, and costs available under the ICFA.

149. Plaintiff Baker and/or the other members of the Illinois State Subclass will provide or have already provided any required notice to appropriate entities regarding Microsoft's unfair and deceptive trade practices.

SEVENTH CAUSE OF ACTION

VIOLATION OF THE MICHIGAN CONSUMER PROTECTION ACT ("MCPA")

(Mich. Comp. Laws §§ 445.901 *et seq.*)

(Asserted on behalf of the Michigan State Subclass)

150. Plaintiffs re-allege the preceding paragraphs as if set forth fully here.

151. Plaintiff Mark Risk asserts this cause of action on behalf of himself and all other members of the Michigan State Subclass.

152. The Michigan Consumer Protection Act ("MCPA") is codified at Mich. Comp. Laws §§ 445.901 *et seq.*

153. Plaintiff Risk and the other members of the Michigan State Subclass are "persons" as that term is defined by the MCPA. Mich. Comp. Laws § 449.102(d).

154. The MCPA authorizes any "person who suffers loss as a result of a violation of this act [to] bring a

class action on behalf of persons residing or injured in this state for the actual damages caused by . . . [a] method, act, or practice in trade or commerce defined as unlawful under" the MCPA. Mich. Comp. Laws § 445.911.

155. The MCPA describes "unfair, unconscionable, or deceptive methods, acts, or practices in conduct of trade or commerce" as including:

> (c) Representing that goods or services have . . . characteristics, uses, [or] benefits . . . that they do not have. . . . (e) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another. . . . (n) Causing a probability of confusion or of misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction. . . . (s) Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer. . . . (bb) Making a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is. (cc) Failing to reveal facts that are material to the transaction in light of representations of fact made in a positive manner.

Mich. Comp. Laws § 445.903.

156. Microsoft committed one or more unfair and deceptive acts and practices as defined by the above-quoted provisions of Mich. Comp. Laws § 445.903, with the intent to induce Plaintiff Risk and the other

members of the Michigan State Subclass to rely on those unfair and deceptive acts and practices in deciding to purchase and use Xbox 360s. Microsoft committed those unfair and deceptive acts and practices during trade and commerce. Mich. Comp. Laws § 445.902(g).

157. Thus, Microsoft violated the MCPA by:

a. Representing that the Xbox 360 had characteristics, and/or benefits that they do not have, in that Xbox 360s scratch game discs such that they prevent the discs from functioning properly and, in many cases, scratch the discs so severely as to render them unusable;

b. Representing that the Xbox 360 are of a particular standard and quality in that they allegedly will not damage game discs, when they do cause such damage;

c. Causing a probability of confusion and of misunderstanding as to the legal rights, obligations, or remedies of Plaintiff Risk and the rest of the Michigan State Subclass concerning their rights under the Microsoft disc replacement program;

d. Failing to reveal material facts concerning the propensity of the Xbox 360 to damage game discs, the omission of which mislead and/or deceived Plaintiff Risk and the Michigan State Subclass. That fact could not reasonably be known by Plaintiff Risk and the Michigan State Subclass when they purchased or otherwise acquired their Xbox 360s; and

e. Representing that the Xbox 360 could play game discs without damaging them. The

statements of fact were material to the transactions such that Plaintiff Risk and the Michigan State Subclass reasonably believed the represented or suggested state of affairs to be other than it actually was.

158. Plaintiff Risk and the rest of the members of the Michigan State Subclass justifiably relied upon the unfair and deceptive acts and practices of and by Microsoft in deciding to purchase the Xbox 360.

159. Plaintiff Risk and all other members of the Michigan State Subclass were exposed to the same or substantially similar misrepresentations by seeing the same sales literature, including internet advertising, and forms and in sales of products bearing the Xbox 360 logo at various stores and on the Internet in Michigan.

160. Had Plaintiff Risk and the other members of the Michigan State Subclass known that the Xbox 360 defect had the capacity to and, in many cases, did actually damage game discs during normal and expected use, they would not have purchased and/or used the Xbox 360.

161. As a direct and proximate result of Microsoft's violations of the foregoing laws, Plaintiff Risk and the other members of the Michigan State Subclass have been injured.

162. The members of the Michigan State Subclass have been damaged and are entitled to all of the damages, remedies, fees, and costs available under the MCPA.

163. Plaintiff Risk and/or the other members of the Michigan State Subclass will provide or have already provided any required notice to appropriate entities

regarding Microsoft's unfair and deceptive trade practices.

EIGHTH CAUSE OF ACTION

VIOLATION OF THE NEW YORK CONSUMER PROTECTION

FROM DECEPTIVE PRACTICES ACT

(N.Y. Gen. Bus. Law § 349)

(Asserted on behalf of the New York State Subclass)

164. Plaintiffs re-allege the preceding paragraphs as if set forth fully here.

165. Plaintiff Jesse Bernstein asserts this cause of action on behalf of himself and all other members of the Michigan State Subclass.

166. The New York Consumer Protection from Deceptive Practices Act is codified at New York General Business Law § 349.

167. New York General Business Law § 349 provides: "Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful."

168. Microsoft violated New York General Business Law § 349 by marketing, including labeling, the Xbox 360 in a misleading way regarding facts material to the Xbox 360, and by failing to reveal facts material to the Xbox 360, to Plaintiff Bernstein and the rest of the members of the New York State Subclass.

169. Microsoft engaged in such deceptive acts and practices and false advertising with the intent to induce Plaintiff Bernstein and the rest of the members of the New York State Subclass to rely on those

deceptive acts and practices and false advertising when they decided to purchase and use Xbox 360s. Microsoft committed those deceptive acts and practices and false advertising during business, trade and commerce.

170. Plaintiff Bernstein and the rest of the New York State Subclass justifiably acted or relied to their detriment on the representations, concealment and/or non-disclosed facts as evidenced by their purchase and/or use of defective Xbox 360s.

171. Plaintiff Jesse Bernstein and all other members of the New York State Subclass were exposed to the same misrepresentations by seeing the same sales literature, including internet advertising, and forms and in sales of products bearing the Xbox 360 logo at various stores in New York.

172. New York General Business Law § 349(h) authorizes "any person who has been injured by reason of any violation of this section [to] bring an action in his own name" to enjoin such unlawful act or practice, or to recover damages, or both. Plaintiff Jesse Bernstein and the other members of the New York State Subclass are persons authorized by New York General Business Law § 349 to bring this action.

173. Had Plaintiff Bernstein and the other members of the New York State Subclass known that the Xbox 360 defect had the capacity to and, in many cases, did actually damage game discs during normal and expected use, they would not have purchased and/or used the Xbox 360.

174. As a direct and proximate result of Microsoft's violations of the foregoing laws, Plaintiff Bernstein and the other members of the New York State Subclass have been injured.

175. The members of the New York State Subclass have been damaged and are entitled to all of the damages, remedies, fees, and costs available under New York General Business Law § 349.

176. Plaintiff Bernstein and/or the other members of the New York State Subclass will provide or have already provided any required notice to appropriate entities regarding Microsoft's unfair and deceptive trade practices.

NINTH CAUSE OF ACTION

VIOLATION OF THE WASHINGTON CONSUMER PROTECTION ACT "CPA"

(Rev. Code Wash. ch. 19.86)

(Asserted on behalf of the Nationwide Damaged Disc Subclass)

177. Plaintiffs re-allege the preceding paragraphs as if set forth fully here.

178. Plaintiffs assert this cause of action on behalf of themselves and all the rest of the members of the Nationwide Damaged Disc Subclass. The CPA is codified at Rev. Code Wash. ch. 19.86. The statute provides consumers with a comprehensive procedure for redressing the violations of applicable law. Accordingly, the conduct at issue in this case falls within the scope of the CPA.

179. The CPA declares "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" unlawful. Rev. Code. Wash. § 19.86.020.

180. The CPA further provides a private right of action to any person "injured in his or her business or property." Rev. Code Wash. § 19.86.090.

181. Microsoft had a statutory duty to refrain from unfair or deceptive acts or practices in the design, development, promotion, sale and/or manufacture of the Xbox 360.

182. Microsoft has, in the course of its business, engaged in unfair or deceptive acts or practices by: (1) marketing and selling Xbox 360s with a defect that causes damage to game discs during normal use; and (2) failing to disclose this known defect and risk.

183. Microsoft's acts or practices have been "injurious to the public interest" because they injured other persons, had the capacity to injure other persons and/or have the capacity to injure other persons. Rev. Code Wash. § 19.86.093.

184. The facts not disclosed by Microsoft to Plaintiffs and the other members of the Nationwide Damaged Disc Subclass are material facts that a reasonable person would have considered important in deciding whether or not to purchase the Xbox 360.

185. Plaintiffs and the rest of the members of the Nationwide Damaged Disc Subclass justifiably acted or relied to their detriment on the representations, concealment and/or non-disclosed facts as evidenced by their purchase and/or use of defective Xbox 360s.

186. Had Plaintiffs and the rest of the members of the Nationwide Damaged Disc Subclass known that the Xbox 360 had the capacity to and, in many cases, did actually damage their valuable game discs, they would not have purchased and/or used the Xbox 360.

187. Had Microsoft not engaged in the unfair or deceptive conduct described above, Plaintiffs and the rest of the members of the Nationwide Damaged Disc

Subclass would not have purchased, paid for, and/or used their Xbox 360s.

188. Microsoft's unfair or deceptive representations and material omissions to consumers and the public regarding the true nature of the Xbox 360 purchased and used by Plaintiffs and the rest of the members of the Nationwide Damaged Disc Subclass constituted unfair and deceptive acts and practices in violation of Rev. Code Wash. ch. 19.86.

189. As a direct and proximate result of Microsoft's violations of the CPA, Plaintiffs and the rest of the Nationwide Damaged Disc Subclass have been injured in their property.

190. Plaintiffs and the rest of the members of the Nationwide Damaged Disc Subclass have been damaged and are entitled to all of the damages, remedies, fees, and costs available under the CPA. Rev. Code Wash. § 19.86.090.

TENTH CAUSE OF ACTION

NEGLIGENCE – DESIGN DEFECT AND FAILURE TO WARN (PRODUCTS LIABILITY)

(Asserted on behalf of the Nationwide Console Class and the Nationwide Damaged Disc Subclass)

191. Plaintiffs re-allege the preceding paragraphs as if set forth fully here.

192. Plaintiffs assert this common law cause of action on behalf of themselves and all other members of the Nationwide Console Class and the Nationwide Damaged Disc Subclass.

193. Microsoft designed, manufactured, sold, and/or distributed the Xbox 360 for use in the home by

ordinary consumers with no special precautions during installation and use.

194. The Xbox 360 had the capacity to, and in many cases did, actually damage game discs during normal use when it left the hands of Microsoft.

195. Microsoft had a duty to exercise reasonable care in the design, manufacture, sale and/or distribution of the Xbox 360, including a duty to ensure that the Xbox 360 did not have the capacity to damage game discs during normal use.

196. Microsoft failed to exercise reasonable care in the design, manufacture, sale, and/or distribution, of the Xbox 360.

197. Specifically, Microsoft was negligent in its design, manufacture, testing, inspection, sale and/or distribution of the Xbox 360 in that it:

a. Failed to use reasonable care in designing and/or manufacturing the Xbox 360 so as to avoid the harm of damaging game discs during ordinary use;

b. Failed to conduct adequate quality testing of the Xbox 360 to determine the safety of the Xbox 360 prior to sale; and

c. Failed to accompany the Xbox 360 with proper warnings regarding the possibility of damaged game discs during normal use.

198. Despite the fact that Microsoft should have known that the Xbox 360 has the capacity to damage—and in many cases has damaged—game discs during normal use, Microsoft continued to market and sell the Xbox 360 to consumers, including Plaintiffs and other members of the Nationwide Console Class and the Nationwide Damaged Disc Subclass.

199. Microsoft should have known that Plaintiffs and other members of the Nationwide Console Class and the Nationwide Damaged Disc Subclass would foreseeably be put at risk and suffer damaged game discs as a result of Microsoft' s failure to warn of the likelihood of damage to game discs during normal use.

200. Microsoft's negligence proximately caused Plaintiffs and other members of the Nationwide Console Class and the Nationwide Damaged Disc Subclass to be injured in that their game discs were damaged by the Xbox 360 during normal use.

201. Plaintiffs do not allege negligence claims based on an injury to the Xbox 360 itself; Plaintiffs' negligence claims relate to injuries to property that they and members of the Nationwide Console Class and the Nationwide Damaged Disc Subclass sustained as a result of the Xbox 360.

ELEVENTH CAUSE OF ACTION

STRICT LIABILITY - DESIGN DEFECT AND FAILURE TO WARN

(PRODUCTS LIABILITY)

(Asserted on behalf of the Nationwide Console Class and the Nationwide Damaged Disc Subclass)

202. Plaintiffs re-allege the preceding paragraphs as if set forth fully here.

203. Plaintiffs assert this common law cause of action on behalf of themselves and all other members of the Nationwide Console Class and the Nationwide Damaged Disc Subclass.

204. Microsoft designed, manufactured, sold and/or distributed Xbox 360s.

205. The Xbox 360s that Microsoft designed, manufactured, sold and/or distributed were defective in design and/or manufacturing. Further, the Xbox 360s were defective when they left the control of Microsoft such that: (1) the foreseeable risks exceeded the benefits associated with the design or manufacturing with same, or (2) they were unreasonably dangerous, more dangerous than an ordinary consumer would expect, and/or more dangerous than other gaming consoles, including but not limited to the Nintendo Wii and the Sony PlayStation 3.

206. Microsoft should have known that the Xbox 360 contained a non-obvious danger to game discs during normal use. Moreover, the potential for damaging gamed discs during normal use was a known danger.

207. Microsoft knew that Plaintiffs and other members of the Nationwide Console Class and the Nationwide Damaged Disc Subclass would use the products without first inspecting them for unreasonably dangerous ODD designs that may cause damage to game discs during normal use. However, Microsoft failed to inform Plaintiffs and other members of the Nationwide Console Class and the Nationwide Damaged Disc Subclass as to the risk of damage to game discs that the Xbox 360's ODD design posed.

208. The Xbox 360 was expected to and did reach Plaintiffs and other members of the Nationwide Console Class and the Nationwide Damaged Disc Subclass without substantial change in condition.

209. The Xbox 360s that Microsoft designed, manufactured, sold and/or distributed were defective due to inadequate warning and inadequate inspection

and testing, and inadequate reporting regarding the results of quality-control testing and safety inspections, or lack thereof.

210. Had Plaintiffs and other members of the Nationwide Console Class and the Nationwide Damaged Disc Subclass been warned about the capacity of the Xbox 360s to damage game discs during normal use, they would not have purchased, acquired, or otherwise obtained the Xbox 360s, nor would they have used the Xbox 360s.

211. As a direct and proximate result of the defective condition of the Xbox 360 as designed, manufactured, sold and/or distributed by Microsoft, Plaintiffs and other members of the Nationwide Console Class and the Nationwide Damaged Disc Subclass have been injured.

212. Plaintiffs do not allege strict liability claims based on an injury to the Xbox 360 itself; Plaintiffs' strict liability claims relate to injuries that they and members of the Nationwide Console Class and the Nationwide Damaged Disc Subclass sustained as a result of the Xbox 360.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of all those similarly situated, pray for judgment against Microsoft as follows:

A. Determine that this action may be maintained as a class action with respect to a Nationwide Console Class, Nationwide Damaged Disc Subclasses, and with Subclasses corresponding to the several states' laws, pursuant to the appropriate subsections of Rule 23 of the Federal Rules of Civil Procedure; that the Court

certify a class action with respect to particular issues if appropriate; that the Court designate and appoint the named Plaintiffs to serve as Class Representatives, designate and appoint the undersigned counsel as Class Counsel, and designate and appoint Chitwood Harley Harnes LLP, Keller Rohrback L.L.P., Kopelowitz Ostrow Ferguson Weiselberg Keechl, Stritmatter Kessler Whelan Coluccio, and Wasserman Comden Casselman & Esensten LLP as Lead Class Counsel;

B. Require that Microsoft ensure that the Xbox 360's Optical Disc Drive lack the capacity to damage game discs during normal use;

C. Require Microsoft to submit product testing results on a regular basis to ensure that their products lack the capacity to damage game discs during normal use;

D. Award damages to Plaintiffs and members of the Class and Subclasses for damage to their game discs;

E. Award costs to Plaintiffs and members of the Class and Subclasses for reimbursement of the costs of replacement game discs damaged by the Xbox 360 during normal use;

F. Award damages to Plaintiffs and members of the Class and Subclasses for payments, in whatever form, rendered for their unreasonably dangerous Xbox 360s;

G. Declare the conduct of Microsoft as alleged herein to be unlawful;

H. Grant Class and Subclass Members awards of actual, compensatory, treble, punitive and/or

exemplary damages in such amount to be determined at trial and as provided by applicable law;

I. Grant Class and Subclass Members their costs of suit, including reasonable attorneys' fees, costs, and expenses as provided by law;

J. Grant Class and Subclass Members both pre-judgment and post-judgment interest as provided by law; and

K. Grant Class and Subclass Members such other, further, and different relief as the nature of the case may require or as may be determined to be just, equitable, and proper by this Court.

DATED this 27th day of June, 2011

KELLER ROHRBACK L.L.P.

By /s/ Amy Williams-Derry
Amy Williams-Derry, WSBA #28711
Mark A. Griffin, WSBA #16296
KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101
Telephone: (206) 623-1900

KOPELOWITZ OSTROW FERGUSON WEISELBERG KEECHL
Jeffrey M. Ostrow
200 S.W. 1st Avenue, 12th Floor
Fort Lauderdale, FL 33301
Telephone: (954) 525-4100

CHITWOOD HARLEY HARNES LLP
Gregory E. Keller, WSBA #13040
Darren T. Kaplan
2300 Promenade II

1230 Peachtree Street, N.E.
Atlanta, Georgia 30309
Telephone: (404) 873-3900

WASSERMAN COMDEN CASSELMAN & ESENSTEN LLP
Melissa M. Harnett
Gregory B. Scarlett
5567 Reseda Blvd, Suite 330
Tarzana, California 91356
Telephone: (818) 705-6800
Facsimile: (818) 996-8266

STRITMATTER KESSLER WHELAN COLUCCIO
Paul L. Stritmatter, WSBA # 4532
Kevin Coluccio, WSBA # 16245
Brad J. Moore, WSBA # 21802
200 Second Avenue West
Seattle, Washington 98119
Telephone: (206) 448-1777

Attorneys for Plaintiffs

EXHIBIT A

WASSERMAN, COMDEN,
CASSELMAN & ESENSTEN, L.L.P.
LOS ANGELES OFFICE
5567 RESEDA BOULEVARD
SUITE 330
TARZANA, CALIFORNIA 91356
MAIL TO P.O. BOX 7033, TARZANA, CA 91357-7033
18181 705-6800 (323) 872-0995
FAX (818) 345-0162
WWW.WCCELAW.COM

February 18, 2011

7008 0150 0000 5246 1243
VIA CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

Legal Department
MICROSOFT CORPORATION
1 Microsoft Way
Redmond, WA 98052

Re: Microsoft Xbox 360 Gaming Consoles

To Whom It May Concern:

This firm, along with our co-counsel Keller Rohrback LLP, Chitwood Harley Harms LLP, and Kabateck Brown Kellner LLP, represent Seth Baker, Matthew Danzig, Nathan Marlow, Jesse Bernstein and Mark Risk ("Plaintiffs"). We write on behalf of our clients as well as all other similarly situated purchasers of your Microsoft Xbox 360 gaming consoles ("Xbox 360"), who, as a result of purchasing the Xbox 360, have been subjected to certain unlawful business practices committed by Microsoft Corporation ("You" or "Your").

I. FACTUAL BACKGROUND

You wrongfully profit from the marketing, advertising, distribution and sale of Xbox 360 gaming consoles by failing to warn consumers that the Xbox 360 is defective. Specifically, when an Xbox 360 is tilted or swiveled—even slightly—while a game disc is in the built-in Optical Disc Drive ("ODD"), ODD components can contact the game disc, creating a distinctive circular "gouge" on the underside of the disc.

For example, in or about November 2006, Matthew Danzig purchased an Xbox 360 in California. Between November 2006 and May 2008, he purchased various Xbox 360 games, including "Grand Theft Auto IV," "Madden NFL 07," "Madden NFL 08," and "Gears of War." All four games were scratched by the Xbox 360, permanently damaging them.

In or about November 2007, Seth Baker purchased an Xbox 360 and an Xbox 360 game titled "Call of Duty: Modern Warfare 2" in Illinois. When he played the game, the Xbox 360 scratched the disc, permanently damaging it.

In or about November 2010, Mark Risk purchased an Xbox 360 in Michigan. That same month, he exchanged his first Xbox 360 with a brand new Xbox 360 due to the scratched game disc problem. Mr. Risk also purchased various Xbox 360 games, including "Fallout: New Vegas" and "Tiger Woods PGA Tour 11." Both games were scratched and rendered permanently unreadable by the Xbox 360.

Mr. Risk contacted Microsoft and was instructed to insert two new game discs in the Xbox 360 in order to test the unit. Those discs were also permanently scratched. Microsoft representatives advised him that Microsoft had a replacement policy but that it would

not replace his game discs because they were not manufactured by Microsoft.

Jesse Bernstein purchased an Xbox 360 in New York. He also purchased an Xbox 360 game titled "Tom Clancy's Rainbow Six: Vegas." However, when he attempted to play the game, the disc was scratched by the Xbox 360 and permanently damaged.

Finally, in or about September, 2007, Nathan Marlow purchased an Xbox 360 in Washington. In December 2008, he purchased an Xbox 360 game titled "Gears of War 2." The game was then scratched by the Xbox 360 and permanently damaged.

The scratches on the game discs used by Plaintiffs caused their Xbox 360s to freeze and prevented individual profiles from being saved when using the game discs. The Xbox 360s also rendered their game discs useless and permanently unplayable.

Disc scratches such as those experienced by Plaintiffs are caused by small movements of the Xbox 360 which cause rotating game discs to become decoupled from the ODD spindle and then crash into internal ODD components. This causes the game discs' normal functions and operations to be permanently impaired.

Xbox 360s are intended for use in the home and are depicted in Your sales literature as sitting on the floor near a television or resting on an ordinary shelf within a bookcase or home entertainment center. Your television commercials often depict users engaging in spirited movements as enthusiastically playing games which simulate, among other activities, athletic competition (e.g., "2010 FIFA World Cup South Africa"), infantry warfare (e.g., "Call of Duty") or live rock music performance (e.g., "Guitar Hero").

You have recently launched the "Kinect," a peripheral device for the Xbox 360 which tracks body movements and allows users to control games though their own movements in space. Your campaign for the Kinect advises users to "Simply jump in."

The printed user instruction materials packaged with the Xbox 360 do not indicate anywhere that the Xbox 360 ODD can scratch discs due to even the smallest of movements, including the minute unintentional movements to which it is reasonably expected all consumer devices will be subjected when placed in an ordinary household environment due to vibrations or other sources of indirect force being applied to the Xbox 360.

The printed user instruction materials packaged with the Xbox 360 do not caution users to place their consoles on any special type of platform designed to isolate the console from vibrations or other sources of indirect force during normal use.

Despite numerous complaints you have received from consumers about the circular scratches to game discs, You have publicly denied the problem and have claimed that the game discs were damaged due to deliberate movement of the Xbox 360 while the discs were being played.

You have refused to recall the Xbox 360 to repair the problem with the ODD and You have refused to provide compensation to class members whose game discs were damaged by the Xbox 360 ODD.

The claims and representations made by You regarding the Xbox 360 are false, deceptive, unfair, and unconscionable.

II. LEGAL VIOLATIONS

Your failure to disclose material information violates the California's Consumer Legal Remedies Act ("CLRA"), California's False Advertising Law (California Business and Profession Code § 17500 et seq.) and California's Unfair Competition Act (California Business and Profession Code § 17200 et seq.), the Illinois Consumer Fraud and Deceptive Business Practices Act (815 Ill. Comp. Stat. 505/1 et seq.), the Michigan Consumer Protection Act (Mich. Comp. Laws §§ 445.901 et seq.), the New York Consumer Protection from Deceptive Practices Act (N. Y. Gen. Bus. Law §§ 349 and 350 et seq.), and the Washington Consumer Protection Act (Rev. Code Wash. §§ 19.86 et seq.), by, without limitation:

1) Omitting information material to a consumer's decision as to whether to purchase Xbox 360s;

2) Placing Xbox 360s for sale to the general public when the Xbox 360s do not materially conform to the product's advertisements;

3) Falsely representing that Xbox 360s have characteristics, uses, or qualities that they do not have; and

4) Fraudulently inducing consumers to purchase Xbox 360s based upon those false representations.

Moreover, Your conduct violates State express and implied warranty laws and the Magnuson-Moss Warranty (Federal Trade Commission Improvement Act, 15 U.S.C. § 2301(3)), as well as the express warranties You make in the literature You provide with the Xbox 360s, in that representations, claims, warranties and guarantees made by You regarding the Xbox 360 are false, misleading, and/or omit material

information, and the Xbox 360s are labeled, advertised, marketed, and promoted as if Xbox 360s have characteristics, uses and/or benefits which in fact the Xbox 360s do not have.

III. DEMAND FOR RELIEF

Please consider this an attempt to resolve the claims of our clients and the putative class prior to initiating litigation. Accordingly, a demand is hereby made that, within the next thirty (30) days, You do the following, or confirm in writing that You will do the following within a reasonable time:

1) Ensure that the Xbox 360's ODD lacks the capacity to damage game discs during normal use;

2) Inform consumers of the ODD defect and recall the Xbox 360 to repair the ODD defect;

3) Identify all consumers who, as a result of the ODD defect, had game disc damaged by their Microsoft Xbox 360 gaming consoles, and provide appropriate compensation to all such consumers;

4) Submit product testing results on a regular basis to ensure that the Xbox 360 lacks the capacity to damage game discs during normal use;

5) Agree to irrevocably stop all false and misleading advertising of the Xbox 360; and

6) Pay the attorney fees incurred by Mr. Danzig;

Within thirty days (30) of Your receipt of this notice, please advise us that You have either accomplished the foregoing or agree to do so within a reasonable time.

Very truly yours,

WASSERMAN, COMDEN,
CASSELMAN & ESENSTEN,
L.L.P.
/s/ Gregory B. Scarlett
GREGORY B. SCARLETT

EXHIBIT B

MONTGOMERY, MCCRACKEN, WALKER & RHOADS, LLP
ATTORNEYS AT LAW
123 SOUTH BROAD STREET
AVENUE OF THE ARTS
PHILADELPHIA, PA19109
215-772-1500
FAX 215-772-7620

March 23, 2011

Gregory B. Scarlett, Esquire
Wasserman, Comden, Casselman
& Esensten, L.L.P.
5567 Reseda Boulevard
Suite 330
Tarzana, CA 91356

Re: Xbox 360 Consoles

Dear Mr. Scarlett:

I am writing on behalf of Microsoft Corporation in response to your letter of February 18, 2011, which purports to constitute a demand under Section 1782(a) of the California Consumers Legal Remedies Act, Cal. Civ. Code § 1782(a), and the other statutes you mention, regarding your clients Seth Baker, Matthew Danzig, Nathan Marlow, Jesse Bernstein, and Mark Risk. Your letter contains many inaccuracies and fails to comply with the CLRA's requirements.

The purpose of Civil Code § 1782(a) "is to give the manufacturer or vendor sufficient notice of the alleged defects to permit appropriate corrections or replacements." *See Outboard Marine Corp. v. Superior Court*, 52 Cal. App. 3d 30, 40 (1975). The court in *Outboard Marine* explained that the "clear intent of the act is to provide and facilitate precomplaint settlements of

consumer actions wherever possible and to establish a limited period during which such settlement may be accomplished. This clear purpose may only be accomplished by a literal application of the notice provisions." *Id.* at 41.

Your letter is too general to comply with Section 1782(a). It fails to give Microsoft sufficient information. For example, it asserts that Mr. Danzig purchased an Xbox 360 console in California "in or about November 2006" but omits the serial number and gives no description of how Mr. Danzig was using the console, and how it was moved, when his four game discs were scratched. The same is true of Mr. Baker, Mr. Marlow, and Mr. Risk. Your letter says Mr. Bernstein purchased an Xbox 360 console in New York, but fails to say when, omits the serial number, and fails to say how he was using the console, and how it was moved, when his disc was scratched.

Microsoft's design and testing, and the experience of the vast majority of Xbox 360 users whose game discs are never scratched, demonstrate that to scratch a game disc, the console must be moved suddenly with far greater force than would be encountered in normal game play and at an angle to the axis of rotation—something that will not occur in normal use. Microsoft includes a conspicuous warning in the manual, in the quick-start guide, and on a label on the front of every new console not to move the console while a disc is in the tray. Enthusiastic players who make "spirited" movements when playing active games such as Guitar Hero or those designed to be played with the Kinect sensor will have a good experience if the console is placed on a solid surface and used as the instruction manual recommends. Testing has demonstrated that floor or loudspeaker vibrations from normal game

play, even "spirited" game play with the volume turned up, will not cause an Xbox 360 console to scratch a game disc. Contrary to the assertion in your letter, "minute unintentional movements" or "vibrations" "in an ordinary household environment" do not cause disc-scratching.

Your firm, along with your co-counsel Chitwood Harley Harnes LLP, Kabateck Brown Kellner LLP, and Keller Rohrback LLP, are well aware of these facts. Your firm and these three others brought numerous putative class action lawsuits against Microsoft in 2007 that made these same allegations. On October 5, 2009, the U.S. District Court for the Western District of Washington, where five of those suits were consolidated, found that the alleged defect "actually manifests in fewer than one percent of the Xbox consoles sold." *In re Microsoft Xbox 360 Scratched Disc Litigation*, No. C07-71121-JCC, 2009 U.S. Dist. LEXIS 109075, at *20 (W.D. Wash. Oct. 5, 2009). The court denied the plaintiffs' class certification motion, in which your firm participated as co-counsel, because determining whether each consumer caused disc scratching would require "individual attention to each plaintiff on issues of law and fact." *In re Microsoft Xbox 360 Scratched Disc Litigation*, 2009 U.S. Dist. LEXIS 109075, at *22. On January 21, 2010, the U.S. Court of Appeals for the Ninth Circuit denied the petition filed by your firm and your co-counsel for permission to appeal that decision under Rule 26(f). Your threat to bring yet another class action lawsuit over this same issue raises serious concerns that you and your co-counsel are attempting to evade the finality of the court's ruling and shop for a forum you consider more favorable in which to litigate the same issues over again.

Microsoft complies with all applicable laws, including those named in your letter. Your assertion that Microsoft violated them is groundless, as you and your co-counsel are aware. The vast majority of Xbox 360 users follow the instructions in the manual, in the quick-start guide, and on the console, and have a terrific gaming experience.

Microsoft is unable to provide the relief you demand in your letter. First, Microsoft knows through its design, testing, and experience, that the Xbox 360 lacks the capacity to damage game discs during normal use and operation of the console. Second, Microsoft is unable to inform consumers of any defect in the Xbox 360 or to identify consumers who have defective consoles because the Xbox 360 console is not defective. Third, Microsoft has never engaged in false or misleading advertising of the Xbox 360 console. Finally, in these circumstances, it would be inappropriate for Microsoft to pay Mr. Danzig's attorneys' fees incurred in sending your letter.

Very truly yours,

/s/ Charles B. Casper
Charles B. Casper

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

[Filed 03/27/12]

Case No. 11-cv-00722-RSM

SETH BAKER, JESSE BERNSTEIN, MATTHEW DANZIG, JAMES JARRETT, NATHAN MARLOW, and MARK RISK, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MICROSOFT CORPORATION, a Washington Corporation,

Defendant.

ORDER ON DEFENDANT'S MOTION TO STRIKE PLAINTIFFS' CLASS ALLEGATIONS

This matter comes before the Court on Defendant's motion to strike class allegations or, in the alternative, deny certification of Plaintiffs' proposed classes. Dkt. # 14. Having reviewed the motion, Plaintiffs' response, Defendant's reply, and all documents submitted in support thereof, the Court hereby GRANTS Defendant's motion and STRIKES Plaintiffs' class allegations.

I. BACKGROUND

The parties are familiar with the facts and allegations underlying this action, and the Court summarizes them here only in brief. In this putative class action, Plaintiffs claim that a video game console

manufactured by Defendant Microsoft – the Xbox 360 – is inherently defective because, when tilted or swiveled, the console gouges the game discs inserted into it, thereby rendering them permanently unplayable. Pursuant to Federal Rule 23, Plaintiffs bring this action individually and on behalf of two classes of people that they claim are similarly situated: (1) all persons in the United States who own Xbox 360 gaming consoles (the "Console Class"); and (2) all persons in the United States who had game discs damaged by their Xbox 360 gaming consoles (the "Damaged Disc Class").[1]

A. Scratched Disc Litigation

This case is identical in pertinent part to a putative class action previously pursued by Plaintiffs' counsel in which plaintiffs asserted the same claims at issue here on behalf of the same putative classes (hereinafter, the "Scratched Disc Litigation").[2] Following extensive discovery in the Scratched Disc Litigation, Hon. John C. Coughenour entered an order denying class certification. *In re Microsoft Xbox 360 Scratched Disc Litig.*, C07-1121-JCC, 2009 U.S. Dist. LEXIS 109075 (W.D. Wash. Oct. 5, 2009) (hereinafter, the "Certification Denial Order"). Although plaintiffs sought permission to appeal the Certification Denial Order, the Ninth Circuit denied that request. The

---

[1] Plaintiffs purport to subdivide the Damaged Disc Class into four subclasses based upon users who reside in California, Illinois, Michigan, and New York.

[2] Although Plaintiffs here have made a handful of changes with respect to the legal claims asserted and proposed class definitions underlying the Scratched Disc Litigation, those changes are not relevant to the Court's analysis.

plaintiffs in the Scratched Disc Litigation subsequently settled their claims on an individual basis.

In the Certification Denial Order, Judge Coughenour cited to the case of *Gable v. Landrover N.A., Inc.*, a putative class action out of the Central District of California. No. CV07-0376, 2008 U.S. Dist. LEXIS 82996 (C.D. Cal. Sept. 29, 2008). Judge Coughenour found that the facts of *Gable* were analogous in pertinent part to those before the court, and that the reasoning underlying that decision was "persuasive." *Id.* at *19.

In *Gable*, the plaintiffs sought to represent a class of consumers who had purchased or leased a certain model of Land Rover. The plaintiffs alleged that all of the vehicles suffered a common manufacturing defect that caused the tires on some of the vehicles to wear out unevenly. On the basis of that alleged defect, the plaintiffs brought claims for violation of Michigan's Consumer Protection Act, breach of the vehicles' limited warranty, breach of a separate warranty applicable to the vehicles' tires, breach of the implied warranty of merchantability, and unjust enrichment.

The *Gable* court denied the plaintiffs' motion for class certification because it concluded that individual issues of damages predominated over common issues. The court based this decision upon evidence that more than half of the proposed class members had not experienced the defect at issue. *Id.* at *9. The *Gable* court also found that individual issues of causation predominated because,

> [w]ithout individual inquiry, there is no way in adjudicating this case to determine whether the need for a particular repair was based on normal wear, a defective original

> part, a defective after-market part, environmental factors such as weather or road conditions, the presence of foreign objects in the braking system, the failure of parts other than the braking system, poor workmanship by a third party, or individual driving habits.

Id. at *11.

After reciting the foregoing portions of the *Gable* opinion, Judge Coughenour determined that individual issues of damages and causation likewise precluded class certification in the Scratched Disc Litigation. As to the proposed Console Class, Judge Coughenour determined that individual issues of damages predominated because, just as in *Gable*, the alleged defect did not manifest in the majority of Xbox360 consoles sold. In fact, Judge Coughenour found that the alleged defect actually manifests in less than one percent of Xbox360 consoles sold. *See* Certification Denial Order, at *20-21.

Judge Coughenour also determined that individual issues of causation predominated as to both proposed classes because, like the situation in *Gable*, factors other than the alleged defect could have caused the damages claimed by the prospective class members. Judge Coughenour observed, for example, that a class member's dog could have knocked his or her Xbox360 console over while it was in use, or that an overzealous gamer might have unwittingly struck the machine during its operation – either of which could have caused the discs to scratch. On the basis of those observations, Judge Coughenour found that "[w]hether each user's actions constituted misuse, and whether his or her use/misuse caused the damage, would present individual issues of fact for the jury." *Id.* at *22.

Because he determined that individual issues of damages and causation predominated over common issues, Judge Coughenour held that the plaintiffs could not satisfy the class certification requirements of Federal Rule 23. As such, Judge Coughenour denied the plaintiffs' class certification motion.

B. *Wolin v. Jaguar*

Several months after dismissal of the Scratched Disc Litigation, the Ninth Circuit reversed the *Gable* decision cited to by Judge Coughenour. *Wolin v. Jaguar Land Rover North Am., LLC*, 617 F.3d 1168 (9th Cir. 2010). According to the Ninth Circuit, the *Gable* court "erred when it concluded, without discussion, that certification is inappropriate because [plaintiffs] did not prove that the defect manifested in a majority of the class's vehicles." *Id.* at 1173. As the *Wolin* court noted, "proof of the manifestation of a defect is not a prerequisite to class certification." *Id.* at 1173.

The Ninth Circuit noted, however, that claims based upon the vehicles' tire warranties – hereinafter, the "Tire Warranty Claims" or the "Tire Warranty Class" – "may not be amenable to class treatment" because "[t]ires deteriorate at different rates depending on where and how they are driven." *Id.* at 1174. As such, the *Wolin* court concluded that "[w]hether each proposed class member's tires wore out, and whether they wore out prematurely and as a result of the alleged alignment defect, are individual causation and injury issues that could make class-wide adjudication inappropriate." *Id.* at 1174.

On remand, the *Gable* court certified classes with respect to all but one of the plaintiffs' claims. Consistent with the Ninth Circuit's observations in

Wolin, the *Gable* court declined to certify the Tire Warranty Class because it concluded that individual issues of causation – e.g., driving habits, road conditions, and weather – predominate. *Gable v. Land Rover North America, Inc.*, CASE NO. SACV 07-0376 AG (RNBx), 2011 U.S. Dist. LEXIS 90774 (C.D. Cal. July 25, 2011).

C. The Instant Litigation

Plaintiffs initiated this action shortly after the Ninth Circuit's decision in *Wolin*, arguing that its reversal of *Gable* constitutes a change in the law underlying the Certification Denial Order. As such, Plaintiffs take the position that *Wolin* is binding upon this Court and that the Certification Denial Order is not. Proceeding from that premise, Plaintiffs assert that they are entitled to maintain the instant litigation notwithstanding the fact that Judge Coughenour has already refused to certify classes that are identical in pertinent part to the ones at issue here.

Defendant disagrees, arguing that *Wolin* does not constitute a change in the law and that principles of comity require adherence by this Court to Judge Coughenour's prior ruling. As such, Defendant asks the Court to strike Plaintiffs' class allegations or, alternatively, to deny class certification on the same grounds set forth in the Certification Denial Order.

II. DISCUSSION

A. Legal Standard

For over a century, federal courts have recognized that "[c]omity is not a rule of law, but one of practice, convenience and expediency. It is something more than mere courtesy, which implies only deference to

the opinion of others, since it has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question." *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488-489 (1900).

The Supreme Court recently addressed the role that comity should play within the class certification context. In the case of *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), the court acknowledged the "policy concerns" that arise when class counsel makes repeated efforts to certify the same class "'by the simple expedient of changing the named plaintiff in the caption of the complaint.'" *Id.* at 2381 (citation omitted). Although the *Smith* court held that collateral estoppel principles cannot be used to bind members of putative classes that were never certified, the court expressed its expectation that "federal courts [will] apply principles of comity to each other's class certification decisions when addressing a common dispute." *Id.* at 2382. As the *Smith* court explained, "our legal system generally relies on principles of stare decisis and comity among courts to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs." *Id.* at 2381.

Although the *Smith* court gave no specific guidance as to *how* lower courts should apply principles of comity within the class certification context, this comes as little surprise since the application of such principles has long been within the discretion of the court. *See, e.g., Church of Scientology v. U.S. Dept. of the Army*, 611 F.2d 738, 749 (9th Cir. 1979); *Barapind v. Reno*, 225 F.3d 1100, 1109 (9th Cir. 2000). A well-known treatise cited by the *Smith* court proposes one approach to applying principles of comity within the class certification context, stating that "a denial of

class certification should raise a rebuttable presumption against the same aggregate treatment in another court. The basis for this presumption is not preclusion but, rather, comity." ALI, Principles of the Law Aggregate Litigation, § 2.11, at p. 179 (hereinafter, "ALI § 2.11").

In the absence of any specific guidance from the Ninth Circuit or Supreme Court as to how federal courts should "apply principles of comity to each other's class certification decisions," the Court adopts the approach set forth in ALI § 2.11. As such, the Certification Denial Order gives rise to a rebuttable presumption against aggregate treatment in this action. *Id.* The critical question therefore becomes whether Plaintiffs can rebut that presumption. *Id.*

Plaintiffs assert that the Ninth Circuit's decision in *Wolin* suffices to rebut the presumption because it constitutes a change in the law relied upon by Judge Coughenour. *See* ALI § 2.11 ("[W]hen the basis for the earlier denial . . . is no longer present in a subsequent proceeding . . ., the presumption [against aggregate treatment] would be rebutted."). Defendant takes the opposite position. For the reasons set forth below, the Court concludes that *Wolin* does not rebut the presumption against aggregate treatment as to either of the proposed classes, and the Court therefore employs principles of comity in deferring to the Certification Denial Order.

B. The Damaged Disc Class

The Court easily reaches this conclusion with respect to the Damaged Disc Class because the claims its members seek to advance are analogous to the Tire Warranty Claims the *Wolin* court found "may not be amenable to class treatment."

Like the Tire Warranty Claims in *Gable*, Judge Coughenour found that the Damaged Disc Class seeks to assert claims for which individual issues of causation predominate. Judge Coughenour reasoned as follows:

> With respect to causation, the *Gable* court left open the possibility that a defective design may have contributed to the premature tire wear. The court simply found that other proximate causes may have conspired to produce that result in different ways in different cases, meaning individual issues of fact predominated. The same is true here: Just as poor parallel-parking skills and under-inflated tires may have caused a pre-existing defect to manifest in different ways, the hypothetical pet dog and guitar hero might have set in motion a chain of causes ending in disc scratching. Even if one link of that chain is a design defect, the other links are unique to each plaintiff and require individual attention. The requirements of individual attention to each plaintiff on issues of law and fact make this case an inappropriate candidate for class-action resolution.

Certification Denial Order, at *23-24.

Nothing in *Wolin* undermines that analysis. On the contrary, the Ninth Circuit employed a similar line of reasoning to conclude that the Tire Warranty Claims "may not be amenable to class treatment" because, even if the Land Rovers at issue contained a common alignment defect, "[t]ires deteriorate at different rates depending on where and how they are driven." *Wolin*, 617 F.3d at 1174. On remand, the *Gable* court declined

to certify the Tire Warranty Class for this same reason.

The discs at issue in this case are analogous to the tires at issue in *Gable / Wolin* because, as Judge Coughenour recognized, both products may be damaged for any number of reasons that are unrelated to the manufacturing defects alleged by the plaintiffs. On that basis, Judge Coughenour concluded that individual issues of causation rendered class treatment inappropriate as to the Damaged Disc Class. Because that ruling is perfectly consistent with the Ninth Circuit's holding, the *Wolin* decision does not rebut the presumption against aggregate treatment as to the Damaged Disc Class.

C. The Console Class

The Court reaches the same conclusion as to the proposed Console Class. Although Judge Coughenour declined to certify the Console Class because the overwhelming majority of the Xbox360 consoles at issue did not manifest the defect in question (and the owners of those consoles therefore did not sustain any damages), he also found that individual issues of causation rendered class treatment improper. See Certification Denial Order, at *21-24. As noted above, nothing in *Wolin* undermines Judge Coughenour's causation analysis, which forms an independently sufficient basis for the Certification Denial Order.

Plaintiffs argue that, even though the defect at issue does not express itself with respect to the vast majority of Xbox360 consoles, class certification is still appropriate because *all* Xbox360 consoles contain an *inherent defect* and "proof of the manifestation of a defect is not a prerequisite to class certification." *Wolin*, 617 F.3d at 1173.

But this argument misconstrues the pertinent language of *Wolin* and misses the central point of Judge Coughenour's causation analysis. The *Wolin* court held that manifestation of a defect is not a "prerequisite" to class certification. In other words, there are some situations in which it might be appropriate for a court to certify a class under Rule 23 even though the product defect at issue has not manifested with respect to all individual class members. That is not to say, of course, that the existence of a product defect *ipso facto requires* class certification.

On the contrary, both before and after the Ninth Circuit's decision in *Wolin*, Rule 23(b)(3) has required federal courts to undertake a "rigorous analysis" of "'whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1019 (9th Cir. 2011) (citations omitted). That analysis requires district courts to assess, among other things, whether *individual* issues of damages and causation render aggregate treatment inappropriate.

Judge Coughenour conducted such an analysis in the Scratched Disc Litigation and determined that individual issues of causation and damages did, in fact, preclude class treatment. Nowhere in the Certification Denial Order did Judge Coughenour state or imply that manifestation of a defect is a "prerequisite" to class certification. Instead, he observed that various factors unrelated to the alleged defect "might have set in motion a chain of causes ending in disc scratching." Certification Denial Order, at *23. Thus, as Judge Coughenour stated, "*[e]ven if one link of that chain is a design defect, the other links are unique to each plaintiff and require individual*

attention." Id. (emphasis added). In other words, even when taking for granted that all Xbox360 consoles contain an inherent defect, and even when assuming that a number of Xbox360 consoles actually manifested that defect, Judge Coughenour still concluded that individual issues of *causation* preclude class certification. The portions of the *Wolin* decision on which Plaintiffs rely do nothing to undermine that conclusion, and Plaintiffs have therefore failed to overcome the presumption against aggregate treatment.

It is worth noting that the Ninth Circuit declined to entertain an appeal of the Certification Denial Order at the same time it was considering *Wolin*. Plaintiffs cannot ask this Court – under the guise of a separate litigation – to step into the shoes of the Ninth Circuit and effectively overrule a fellow member of this court. Proceeding in such a manner would undermine well-settled principles of judicial comity. *See Carnegie Nat. Bank v. City of Wolf Point*, 110 F.2d 569, 573 (9th Cir. 1940) ("[T]he various judges who sit in the same court should not attempt to overrule the decisions of each other . . . except for the most cogent reasons."); *Smith*, 131 S. Ct. at 2382 (expressing an expectation that "federal courts [will] apply principles of comity to each other's class certification decisions when addressing a common dispute").

III. CONCLUSION

For all of the foregoing reasons, Defendant's motion, Dkt. # 14, is GRANTED and Plaintiffs' class allegations are hereby STRICKEN.

Dated this 27 day of March 2012.

/s/ Ricardo S. Martinez
RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

No._____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 2:11-cv-00722-RSM

SETH BAKER, JESSE BERNSTEIN, MATTHEW DANZIG, JAMES JARRETT, NATHAN MARLOW, and MARK RISK, individually and on behalf of all others similarly situated,

Plaintiffs-Petitioners,

v.

MICROSOFT CORPORATION, a Washington Corporation,

Defendant-Respondent.

PETITION FOR PERMISSION TO APPEAL UNDER FEDERAL RULE OF CIVIL PROCEDURE 23(f)

The United States District Court for the Western District of Washington The Honorable Ricardo S. Martinez, District Judge

---

MARK A. GRIFFIN
AMY WILLIAMS-DERRY
BENJAMIN GOULD
KELLER ROHRBACK LLP
1201 Third Avenue,
Suite 3200
Seattle, WA 98101-3052
Tel. (206) 623-1900
Fax. (206) 263-3384

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
BACKGROUND	1
I. Facts	1
II. Procedural Posture	3
ARGUMENT	4
I. The District Court's Order Is Appealable Under Rule 23(f) Because It Was Functionally Equivalent to a Decision on Class Certification.	5
II. The District Court's Order Is Manifestly Erroneous Because It Conflicts with This Court's DirectlyControlling Decision in *Wolin*.	7
A. *Wolin* Is on All Fours with This Case.	8
B. The District Court's Decision Cannot Be Squared with *Wolin*.	12
C. Plaintiffs Have Standing to Assert Their Warranty Claims, and Microsoft's Arguments to the Contrary Are Meritless	14
D. The Denial of a pre-*Wolin* Petition in Another Litigation Is Irrelevant	16
III. The District Court's Order Creates a Death-Knell Situation for Plaintiffs.	17
CONCLUSION	18

TABLE OF AUTHORITIES

CASES — Page(s)

Bruno v. Quten Research Inst., LLC,
—F.R.D.—, 2011 WL 5592880 (C.D. Cal. Nov. 14, 2011) 15

Carnegie v. Household Intl, Inc.,
376 F.3d 656 (7th Cir. 2004) 18

Chamberlan v. Ford Motor Co.,
402 F.3d 952 (9th Cir. 2005) ..... *passim*

Gable v. Land Rover N. Am., Inc.,
No. CV07-0376, 2008 WL 4441960 (C.D. Cal. Sept. 29, 2008) 3, 4

Gable v. Land Rover N. Am., Inc.,
No. SACV 07-0376, 2011 WL 3563097 (C.D. Cal. July 25, 2011) 14

In re Bemis Co.,
279 F.3d 419 (7th Cir. 2002) 5, 6

In Re Microsoft Xbox 360 Scratched Disc Litig.,
No. 2:07-cv-01121-JCC (W.D. Wash. Mar. 30, 2010) 18

In re Zurn Plex Plumbing Prods. Liab. Litig.,
644 F.3d 604 (8th Cir. 2011) 15

Lyons v. Coxcom, Inc.,
718 F. Supp. 2d 1232 (S.D. Cal. 2009) 7

San Diego Cnty. Gun Rights Comm. v. Reno,
98 F.3d 1121 (9th Cir. 1996) 15

Stearns v. Ticketmaster Corp.,
655 F.3d 1013 (9th Cir. 2011) 15

Teague v. Lane,
489 U.S. 288 (1989) 17

TABLE OF AUTHORITIES—Continued

Page(s)

Wolin v. Jaguar Land Rover N. Am., LLC, 617 F.3d 1168 (9th Cir. 2010) ..... *passim*

RULES

FED. R. Civ. P. 23 ..... 6, 7, 14

FED. R. Civ. P. 23 advisory committee notes, 1998 amend 17

FED. R. Civ. P. 23(a) 8

FED. R. Civ. P. 23(a)(4) 9

FED. R. Civ. P. 23(b)(3) ..... *passim*

FED. R. Civ. P. 23(f) ..... *passim*

OTHER AUTHORITIES

Am. Law. Inst., *Principles of the Law of Aggregate Litigation* (2010) 12

QUESTION PRESENTED

Plaintiffs allege that every Microsoft Xbox 360 contains an inherent design defect that breaches a uniform warranty. They seek to certify a class of Xbox purchasers. Under *Wolin v. Jaguar Land Rover North America, LLC*, individual causation questions cannot prevent class certification when a product contains an inherent design defect that breaches a uniform warranty. 617 F.3d 1168, 1174 (9th Cir. 2010). By ruling that individual causation issues can prevent certification of Plaintiffs' proposed class, did the district court manifestly err, thus making Rule 23(f) review appropriate?

BACKGROUND

I. Facts

Defendant Microsoft makes the Xbox 360, a video game console. (Dist. Ct. No.[1] 10, ¶ 16.) To play a video game on the Xbox, the user inserts a game disc into the console's optical disc drive. (*Id.* ¶¶ 1, 17.) The Xbox's optical disc drive "reads" the game disc's data and allows the user to play the game stored on the disc.

The six named Plaintiffs each own an Xbox. (*Id.* ¶¶ 3-8.) The Plaintiffs bought game discs to play on their Xboxes, but while they were using their Xboxes in a normal fashion, the Xboxes scratched their discs. (*Id.* ¶¶ 39, 41, 43-44, 46-47, 53, 56-57.) These scratches all had a distinctive circular shape that went all the way around the underside of the game disc. (*See id.* ¶ 23.) These scratches prevented the data on the Plaintiffs' discs from being read by the Xbox's optical

---

[1] "Dist. Ct. No." refers to the document entries on the district court's docket.

disc drive—thus rendering these game discs useless. (*Id.* ¶¶ 23, 41, 44, 47, 53, 57.)

These distinctive scratches, the Plaintiffs allege, point to an inherent design defect present in every Xbox. Unlike industry-standard optical disc drives, which are designed to prevent fast-spinning discs from crashing into internal disc drive components, the Xbox's optical disc drive cannot withstand even minute unintentional movements. Thus, when the Xbox console is moved even minutely, the game disc can become uncoupled from the spindle that holds it, crash into internal disc drive components, and become scratched beyond repair. (*Id.* ¶¶ 24-27.)

Plaintiffs also allege that the Xbox was subject to express and implied warranties. The express warranty provided that the Xbox would be free of any defect that caused it not to conform to the written user instructions. (*Id.* ¶¶ 62, 66.) The implied warranty provided that the Xbox would be free of any defect that made it unfit for its ordinary purpose. (*Id.* ¶ 82.) The Xbox's inherent design defect breaches these warranties because it can scratch game discs under normal use. (*Id.* ¶¶ 62, 66, 82.)

To remedy these breaches, Plaintiffs bring claims for breach of the Xbox's express warranty, the Xbox's implied warranty, and violation of the Magnuson-Moss Warranty Act. (*Id.* ¶¶ 66, 74, 92.) And to bring these claims as a class, they seek to certify a "Nationwide Console Class" under Rule 23(b)(3). This

Class consists of all who own an Xbox 360 gaming console.[2] (*Id.* ¶ 12(a).)

II. Procedural Posture

After Plaintiffs filed their amended complaint, Microsoft filed a motion to strike the complaint's class allegations. (Dist. Ct. No. 14.) Microsoft's motion relied on an earlier proposed class action that had been based on the same design defect in the Xbox. In that proposed class action, a district court, back in October 2009, had denied Rule 23(b)(3) certification based largely on an order in *Gable v. Land Rover North America, Inc.*, No. CV07-0376, 2008 WL 4441960 (C.D. Cal. Sept. 29, 2008). In its motion below, Microsoft argued that the district court should, as a matter of comity, defer to the earlier denial of certification and strike the Plaintiffs' class allegations from their complaint. (Dist. Ct. No. 14 at 12-14.)

In their opposition to Microsoft's motion, Plaintiffs noted that the earlier certification order on which Microsoft relied was based on the order in *Gable*. (Dist. Ct. No. 23.) But *Gable* was appealed and reversed in *Wolin v. Jaguar Land Rover North America, LLC*, 617 F.3 d 1168 (9th Cir. 2010). The intervening change in the law worked by *Wolin* made deference to the earlier certification order inappropriate, even under Microsoft's theory of comity.

The district court granted Microsoft's motion. It concluded that deference to the earlier certification order was appropriate because *Wolin* had not undercut the entirety of the earlier order's reasoning. *See*

---

[2] Before the district court, Plaintiffs asserted other claims and sought to certify other classes, but they do not seek Rule 23(f) review of those claims and classes.

Order at 10, *Baker v. Microsoft Corp.*, No. 2:11-cv-00722-RSM (W.D. Wash. Mar. 27, 2012) (attached as Appendix A).

ARGUMENT

This case is an ideal candidate for review under Rule 23(f). Plaintiffs present a purely legal question to which the district court provided an answer directly contrary to this Court's decision in *Wolin*.

This Court has listed three situations in which Rule 23(f) review will be "most appropriate." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005). These are when:

> (1) there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable; (2) the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; or (3) the district court's class certification decision is manifestly erroneous.

Id. These are "merely guidelines, not a rigid test." *Id.* at 960. The Court may grant a 23(f) petition when just one of the three factors applies. *See id.* (review will ordinarily require "one or more" of the categories to apply).

This case falls under *Chamberlan*'s first and third categories of cases. For purposes of exposition, Plaintiffs will examine these categories in reverse order. After discussing why the district court's order is

appealable under Rule 23(f), Plaintiffs will show (1) why the district court's decision is manifestly erroneous as a matter of law, and (2) why its decision creates a death-knell situation for Plaintiffs.

I. The District Court's Order Is Appealable Under Rule 23(f) Because It Was Functionally Equivalent to a Decision on Class Certification.

The district court struck the class allegations from Plaintiffs' complaint. Because that decision foreclosed the possibility of class certification, it is functionally equivalent to a decision on class certification and is appealable under Rule 23(f).

The Seventh Circuit has already ruled that a motion to strike is appealable under Rule 23(f). *In re Bemis Co.*, 279 F.3d 419 (7th Cir. 2002). In *Bemis*, a defendant employer filed an answer contending that the EEOC, which was suing on behalf of a class of black employees, could not comply with requirements of Rule 23. *Id.* at 420-21. The EEOC moved to strike this part of the answer on the ground that its suit was exempt from Rule 23, and the district court granted the motion. *Id.* at 421. The employer petitioned from that decision under Rule 23(f), and the EEOC argued that the Seventh Circuit lacked jurisdiction because the district court's decision was not formally a decision on class certification. The Seventh Circuit, speaking through Judge Posner, disagreed. The employer's answer had asserted that the suit could not proceed as a class action without complying with Rule 23, and the district court's "rejection of that position was the functional equivalent of denying a motion to certify a case as a class action." *Id.* The decision was thus appealable under Rule 23(f). *Id.*

Like the employer's motion in *Bemis*, Microsoft's motion to strike Plaintiffs' class allegations asserted that this case was not appropriate for "aggregate treatment" under Rule 23. (Dist. Ct. No. 14 at 12-19.) Like the district court's order in *Bemis*, the order granting Microsoft's motion ruled that Plaintiffs could not proceed under Rule 23. This is the "functional equivalent of denying a motion to certify a case as a class action," *Bemis*, 279 F.3d at 421, because it means that Plaintiffs cannot invoke Rule 23 and seek class treatment. The district court's decision is therefore appealable under Rule 23(f).

There is good reason to follow the Seventh Circuit's holding: doing otherwise—and creating a circuit split—would insulate motions to strike in this circuit from Rule 23(f) review. The "kind of error most likely to warrant [Rule 23(f)] review will be one of law, as opposed to an incorrect application of law to facts." *Chamberlan*, 402 F.3d at 959. And because motions to strike are decided on the pleadings and present purely legal issues, *Lyons v. Coxcom, Inc.*, 718 F. Supp. 2d 1232, 1236 (S.D. Cal. 2009), they are particularly well suited to Rule 23(f) review. Insulating motions to strike from Rule 23(f) review would undercut the Rule's purpose.

This Court should follow the Seventh Circuit and hold that the district court's order is appealable, in this Court's discretion, under Rule 23(f).

II. The District Court's Order Is Manifestly Erroneous Because It Conflicts with This Court's Directly Controlling Decision in *Wolin*.

The district court's order was manifestly erroneous. It cannot be squared with this Court's "directly controlling" decision in *Wolin*. *Chamberlan*, 402 F.3d

at 962 (a decision that goes against directly controlling precedent is manifestly erroneous). The district court's error, moreover, is an error of law that appears on the face of its decision. *See id.* (manifest error must be easily ascertainable on the face of the petition). An appeal under Rule 23(f) is appropriate.

Plaintiffs seek certification under Rule 23(b)(3), which provides that certification is appropriate when two requirements are met.[3] First, there is the *predominance* requirement: "questions of law or fact common to class members" must "predominate" over individual questions. FED. R. CIV. P. 23(b)(3). Second, there is the *superiority* requirement: a class action must be "superior to other available methods for fairly and efficiently adjudicating the controversy." *Id.* Microsoft's motion to strike was based solely on the predominance requirement of Rule 23(b)(3). (*See* Dist. Ct. No. 23 at 16 n.7.) Microsoft argued, in reliance on an earlier district court order, that individual questions of damages and causation predominate. (Dist. Ct. No. 14 at 16.)

A. *Wolin* Is on All Fours with This Case.

Plaintiffs allege that their Xboxes are covered by the same express and implied warranties. (Dist. Ct. No. 10, ¶¶ 62, 73-75, 92.) Plaintiffs allege that their Xboxes all had the same inherent design defect that breached these warranties. (*E.g.*, *id.* ¶¶ 17, 27.) Their warranty claims are not predicated on whether this inherent design defect has yet manifested itself in a scratched game disc. They are predicated on whether

---

[3] Certification also requires that the prerequisites of Rule 23(a) be satisfied, but Microsoft has not argued that Plaintiffs fail to satisfy the Rule 23(a) prerequisites.

the inherent design defect exists and whether it breaches the Plaintiffs' uniform warranties.

These facts put this case "on all fours" with *Wolin*. *Chamberlan*, 402 F.3d at 962. There, automobile owners alleged that they all had the same limited warranty, and that their automobiles all had the same inherent defect that breached the limited warranty. *Wolin*, 617 F.3d at 1174. This Court held that this inherent-defect warranty claim "require[d] common proof of the existence of the defect and a determination whether Land Rover violated the terms of its Limited Warranty." *Id.* Accordingly, "common issues predominate[d]," Rule 23(b)(3)'s predominance requirement was met, and certification should have been granted. *Id.*

Thus, *Wolin* holds that in these particular circumstances—where plaintiffs enjoy a uniform warranty and allege an inherent design defect that occurs in every product—common issues of damages and causation predominate *as a matter of law*. In these circumstances, a court may certainly deny certification on other grounds—inadequacy of representation under Rule 23(a)(4), as just one example—but it cannot deny certification on the ground that individual issues of damages and causation predominate.

Wolin is not just binding law its holding is well reasoned, as its application here shows. When *Wolin*'s holding is applied to Plaintiffs' warranty claims, it becomes apparent that common questions of causation and damages predominate.

Wolin held that if a class's warranty claims are based on the mere existence of a uniform design defect, the only question of "causation" will be whether the uniform design defect exists at all—something that

can be proven on a class-wide basis. Here, the limits of normal Xbox use—the maximum amount of force an Xbox should be able to withstand without scratching a disc, for example—may be proven on a common basis by reference to reasonable consumer expectations or the Xbox's own engineering specifications. More common proof, such as the results of laboratory performance testing, can then be adduced to show whether, under the predefined limits of normal use, a game disc is likely to be scratched—and thus whether the design defect really breaches the warranties. Under this method of proof, it becomes irrelevant whether any *individual* plaintiff's game disc was scratched under normal conditions.

Wolin likewise held that individual questions of damages do not arise. Here, because all class members suffered the precisely the same breach of warranty from precisely the same inherent design defect in the Xbox, they all suffered the same injury.

Finally, *Wolin* distinguishes between two different types of warranty claims: (1) those based on the existence of a uniform design defect, and (2) those based on damage *caused* by a uniform design defect. *Wolin* held that under the first type of claim, individual questions of causation and damages will not predominate. Thus, *Wolin* held that for a warranty claim based on an automobile's defectively designed alignment system, individual questions did not predominate. *Wolin*, 617 F.3d at 1173-74. But *Wolin* also dealt with a separate claim asserted under an entirely different warranty—a warranty against tire damage caused by the defectively designed alignment system. *Id.* at 1174. For this claim, said the *Wolin* court, individual questions of causation might predominate. *See id.* Here, Plaintiffs do not base their

claim on the scratched discs that the Xbox's flawed design may have caused. Rather, Plaintiffs claim that their warranties were breached simply by the flawed design of the Xbox's optical disc drive.[4] *See supra* pp. 2-3, 8-9. For *this* sort of warranty claim, *Wolin* is clear that common questions of causation and damages predominate as a matter of law. *Wolin*, 617 F.3d at 1173-74.

B. The District Court's Decision Cannot Be Squared with *Wolin*.

In deciding Microsoft's motion to strike, the district court looked at an earlier proposed class action against Microsoft that had been based on the same Xbox design defect. There, another district court had denied certification on the ground that individual questions of causation and damages predominated. *See* Order, *In re Microsoft Xbox 360 Scratched Disc Litig.*, No. 2:07-cv-01121-JCC (W.D. Wash. Oct. 5, 2009) (attached as Appendix B). The district court in this case, applying principles of comity set out in the American Law Institute's *Principles of the Law of Aggregate Litigation*, deferred to that earlier decision. (Appendix A at 7 (citing Am. Law. Inst., *Principles of the Law of Aggregate Litigation* § 2.11 (2010)).) Crucially, the district court below recognized that, under the *Principles of the Law*, deference to an earlier decision does not apply when there has been an intervening change in the law (*id.*)—but the court ruled that *Wolin*

---

[4] In the district court, Plaintiffs asserted non-warranty claims based on damage caused by the Xbox's design defect. Plaintiffs do not seek review of these non-warranty claims, and they have never alleged that their warranties were breached by the scratches the Xbox's design defect caused. Thus, the only claims before this Court are warranty claims based on the existence of the design defect itself.

did not call the earlier decision into question (*id.* at 9-10).

Thus, the dispositive question is whether the earlier district court decision can be squared with *Wolin*. If *Wolin* and the earlier decision are in direct and irreconcilable legal conflict, as they are, then it was manifestly erroneous to defer to the earlier certification decision and grant Microsoft's motion to strike. Thus, Microsoft's argument for deference to an earlier certification decision does not make Rule 23(f) review inappropriate—indeed, it only makes it *more* appropriate. For even under Microsoft's argument, there can be no deference to an earlier certification decision if that decision has since become obsolete as a matter of law. The district court's ruling that the earlier certification decision is *not* obsolete is a pure and manifest error of law that makes Rule 23(f) review appropriate.

Here, the district court, rather than focusing on this Court's analysis of the inherent-design-defect warranty claim, simply quoted this Court's statement that "manifestation of a defect is not a prerequisite to class certification." *Wolin*, 617 F.3d at 1173. The district court stated that the earlier certification decision was consistent with *Wolin* because it had not made manifestation of a defect a "prerequisite" to class certification. (Appendix A at 10.) Rather, the earlier decision had simply relied on individual questions of causation to deny certification (*id.*), and it was these same questions that continued to make certification inappropriate. The district court in this case did not specify what these individual questions of causation could be. (*Id.*)

The district court in this case did not examine *Wolin*'s discussion of warranty claims. It did not

acknow-ledge that, both here and in *Wolin*, the proposed classes alleged that an inherent design defect appeared in every product sold, and that this design defect breached uniform warranties. Instead, the district court simply ruled that under *Wolin* there may be unspecified individual questions of causation that predominate over common questions and thereby preclude class certification under Rule 23(b)(3).

That ruling was manifestly erroneous because it cannot be squared with *Wolin*. For *Wolin* held, *as a matter of law*, that certification could not be denied on the ground that individual questions of causation predominate. That is certainly how the district court, on remand from *Wolin*, interpreted the *Wolin* decision. *See Gable v. Land Rover N. Am., Inc.*, No. SACV 07-0376, 2011 WL 3563097, at *5 (C.D. Cal. July 25, 2011) ("The Ninth Circuit's holding is clear that the necessary elements of Rule 23 have been met . . . ."). That interpretation conflicts with the district court's decision here. This conflict within the Ninth Circuit makes this Rule 23(f) petition all the more urgent.

The district court manifestly erred by holding that, even after *Wolin*, individual causation issues could preclude certification of Plaintiffs' proposed class under Rule 23(b)(3). After *Wolin*, that cannot be true.

C. Plaintiffs Have Standing to Assert Their Warranty Claims, and Microsoft's Arguments to the Contrary Are Meritless.

Before the district court, Microsoft argued that Plaintiffs lacked standing because an inherent design defect that does not manifest itself in a scratched disc cannot confer Article III standing. The district court did not base its ruling on this argument, but Plaintiffs will briefly discuss two reasons that Microsoft's

argument does not counsel against Rule 23(f) review and is meritless.

First, this is not a question that this Court needs to reach. In *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013 (9th Cir. 2011), this Court said that to satisfy Article III requirements, a class need show only that the representative parties have standing—indeed, that only one representative party has standing. *See id.* at 1021 (on standing, "our law keys on the representative party, not all of the class members, and has done so for many years"); *see also Bruno v. Quten Research Inst., LLC*, — F.R.D. —, 2011 WL 5592880, at *5 (C.D. Cal. Nov. 14, 2011) (following *Stearns* on this point). Since the named Plaintiffs here suffered scratched game discs and not merely the Xbox's inherent design defect, they have standing even under Microsoft's theories.

Second, many cases hold that the existence of a design defect itself is enough to create standing, even if it has not yet manifested itself. *See, e.g., In re Zurn Plex Plumbing Prods. Dab. Litig.*, 644 F.3d 604, 616-17 (8th Cir. 2011). These holdings are based on the uncontroversial principle that the economic harm of buying a product with an inherent design defect—i.e., the defect's diminution of that product's value—creates Article III standing. *See San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1130 (9th Cir. 1996) ("Economic injury is clearly a sufficient basis for standing."). Microsoft may argue that an inherent design defect will create standing only if it is "substantially certain" to manifest itself in other damage. (Dist. Ct. No. 26 at 8-9.) Even if that standard were correct, it is a factual, not a legal, question whether the Xbox's design defect is substantially certain to result in other damage when the console is used normally. It was Microsoft that chose to bring a

motion to strike, and it cannot now raise factual questions in support of a motion that must be decided on the pleadings.

D. The Denial of a pre-*Wolin* Petition in Another Litigation Is Irrelevant.

In the earlier proposed class action alleging the same design defect in the Xbox, the plaintiffs petitioned this Court under Rule 23(f) after the district court had denied certification. That petition was denied on January 21, 2010. Order, No. 09-80160 (9th Cir. Jan. 21, 2010).

Throughout this litigation, Microsoft has emphasized this Court's earlier denial of Rule 23(f) review, but it ignores that that denial came some eight months before *Wolin* came down. Now, however, *Wolin* is on the books. This Court now confronts a district court decision that conflicts with the directly controlling decision in *Wolin*. In these changed circumstances, this petition should be granted.

Microsoft's stress on the earlier petition also presumes it can read this Court's mind. The denial of a Rule 23(f) petition rests in this Court's "unfettered discretion." FED. R. CIV. P. 23 advisory committee notes, 1998 amend. Plaintiffs do not presume to know why this Court denied the earlier petition. Just like the denial of certiorari by the Supreme Court, the denial of a Rule 23(f) petition says nothing about the merits of a district court's decision. *Teague v. Lane*, 489 U.S. 288, 296 (1989); *see also* FED. R. CIV. P. 23 advisory committee notes, 1998 amend. (likening Rule 23(f) to Supreme Court's certiorari power).

III. The District Court's Order Creates a Death-Knell Situation for Plaintiffs.

Rule 23(f) review is also appropriate when "there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable." *Chamberlan*, 402 F.3d at 959. That is true here: Plaintiffs face a death-knell situation, and the district court's order is questionable—indeed, more than questionable.

A "death-knell" situation occurs for plaintiffs when there is "only one path to appellate review: proceeding to a final judgment on the merits of an individual claim that, without the class, is worth far less than the cost of litigation." *Chamberlan*, 402 F.3d at 957 (relying on the advisory committee notes to Rule 23(f)). That description fits this case. The small size of Plaintiffs' claims makes it economically irrational to bear the cost of litigating this case to final judgment. In other words, the district court's order effectively kills the case, since "only a lunatic or fanatic" would incur the costs of litigation to recover the individual amounts of money involved here. *Carnegie v. Household Intl, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

That the district court's order will indeed kill this case is shown by the earlier proposed class action, involving the same Xbox design defect. There, after the district court had denied certification, the parties filed a stipulated motion for dismissal, which the district court then granted. *See* Order, *In Re Microsoft Xbox 360 Scratched Disc Litig.*, No. 2:07-cv-01121-JCC (W.D. Wash. Mar. 30, 2010).

The district court's decision, moreover, is "questionable." *Chamberlan*, 402 F.3d at 959. In fact, it is more than questionable—it is manifestly erroneous under *Wolin*, as Plaintiffs have explained above. 23(f) review should therefore be granted under *Chamberlan*'s "death-knell" criterion.

CONCLUSION

The district court decision is manifestly erroneous because, as a matter of law, it is directly contrary to this Court's decision in *Wolin*. Without immediate appellate review, Plaintiffs face a death-knell situation. For these reasons, Plaintiffs should be granted permission to appeal under Rule 23(f).

DATED this April 9, 2012.

KELLER ROHRBACK LLP

By: Benjamin Gould

MARK A. GRIFFIN
AMY WILLIAMS-DENY
BENJAMIN GOULD
KELLER ROHRBACK LLP
1201 Third Avenue, Suite 3200
Seattle, WA 98101
Telephone: (206) 623-1900

KOPELOWITZ OSTROW FERGUSON
WEISELBERG KEECHL
JEFFREY M. OSTROW
200 S.W. 1st Avenue, 12th Floor
Fort Lauderdale, FL 33301
Telephone: (954) 525-4100

CHITWOOD HARLEY HARNES LLP
GREGORY E. KELLER
DARREN T. KAPLAN
2300 Promenade II
1230 Peachtree Street, N.E.
Atlanta, Georgia 30309
Telephone: (404) 873-3900

WASSERMAN COMDEN CASSELMAN
& ESENSTEN LLP
MELISSA M. HARNETT
GREGORY B. SCARLETT
5567 Reseda Blvd, Suite 330
Tarzana, California 91356
Telephone: (818) 705-6800
Facsimile: (818) 996-8266

STRITMATTER KESSLER WHELAN
COLUCCIO
PAUL L. STRITMATTER
KEVIN COLUCCIO
BRAD J. MOORE
200 Second Avenue West
Seattle, Washington 98119
Telephone: (206) 448-1777

Attorneys for Plaintiffs

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed June 12, 2012]

No. 12-80085
D.C. No. 2:11-cv-00722-RSM
Western District of Washington, Seattle

SETH BAKER; et al.,

Plaintiffs-Petitioners,

v.

MICROSOFT CORPORATION,
a Washington Corporation,

Defendant-Respondent.

ORDER

Before: LEAVY and HAWKINS, Circuit Judges.

The court, in its discretion, denies the petition for permission to appeal the district court's March 27, 2012 order. *See* Fed. R. Civ. P. 23(f); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005) (per curiam).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

[Filed 09/25/12]

Case No. 2:11-cv-00722-RSM

SETH BAKER, JESSE BERNSTEIN, MATTHEW DANZIG, JAMES JARRETT, NATHAN MARLOW, and MARK RISK, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MICROSOFT CORPORATION, a Washington Corporation,

Defendant.

Note on Motion Calendar: October 19, 2012

PLAINTIFFS' MOTION TO DISMISS CASE WITH PREJUDICE

Plaintiffs move that this action be dismissed with prejudice, with all parties to bear their own costs and fees. This motion is not made pursuant to a settlement agreement.

After the Court has entered a final order and judgment, Plaintiffs intend to appeal the Court's

March 27, 2012 order (Dkt. 32) striking Plaintiffs' class allegations.

DATED this 25th day of September, 2012.

KELLER ROHRBACK LLP

By /s/ Amy Williams-Derry
AMY WILLIAMS-DERRY, WSBA #28711
MARK A. GRIFFIN, WSBA #16296
KELLER ROHRBACK LLP
1201 Third Avenue, Suite 3200
Seattle, WA 98101
Telephone: (206) 623-1900

CHITWOOD HARLEY HARNES LLP
GREGORY E. KELLER, WSBA #13040
DARREN T. KAPLAN
2300 Promenade II
1230 Peachtree Street, N.E.
Atlanta, Georgia 30309
Telephone: (404) 873-3900

KOPELOWITZ OSTROW FERGUSON
WEISELBERG KEECHL
JEFFREY M. OSTROW
200 S.W. 1st Avenue, 12th Floor
Fort Lauderdale, FL 33301
Telephone: (954) 525-4100

STRITMATTER KESSLER WHELAN
COLUCCIO
PAUL L. STRITMATTER, WSBA # 4532
KEVIN COLUCCIO, WSBA # 16245
BRAD J. MOORE, WSBA # 21802
200 Second Avenue West
Seattle, Washington 98119
Telephone: (206) 448-1777

WASSERMAN COMDEN CASSELMAN &
ESENSTEN LLP
MELISSA M. HARNETT
GREGORY B. SCARLETT
5567 Reseda Blvd, Suite 330
Tarzana, California 91356
Telephone: (818) 705-6800
Facsimile: (818) 996-8266

Attorneys for Plaintiffs

RECORD
AND
BRIEFS

No. 15-457

Supreme Court, U.S.
FILED
MAR 11 2016
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

v.

SETH BAKER, ET AL.,

Respondents.

On a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR PETITIONER

Bradford L. Smith
Horacio E. Gutiérrez
David M. Howard
Timothy G. Fielden
Microsoft Corporation
One Microsoft Way
Redmond, WA 98052

Charles B. Casper
Montgomery, McCracken
Walker & Rhoads, LLP
123 South Broad Street
Philadelphia, PA 19109

Jeffrey L. Fisher
559 Nathan Abbott Way
Stanford, CA 94305

Stephen M. Rummage
Counsel of Record
Fred B. Burnside
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101
(206) 622-3150
steverummage@dwt.com

QUESTION PRESENTED

Whether a federal court of appeals has jurisdiction under both Article III and 28 U.S.C. § 1291 to review an order denying class certification after the named plaintiffs voluntarily dismiss their claims with prejudice.

PARTIES TO THE PROCEEDINGS

The sole petitioner here (defendant below) is Microsoft Corporation.

In addition to the plaintiff-respondent identified on the cover, Jesse Bernstein, Matthew Danzig, James Jarrett, Nathan Marlow, and Mark Risk were also named plaintiffs below. With the exception of Jesse Bernstein, who dismissed his appeal, these individuals are also respondents here.

RULE 29.6 STATEMENT

Microsoft Corporation, a publicly traded company, has no corporate parent, and no publicly held company has an ownership interest of more than ten percent.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDINGS ii
RULE 29.6 STATEMENT iii
BRIEF FOR PETITIONER 1
OPINIONS BELOW 1
JURISDICTION 1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 1
STATEMENT OF THE CASE 2
A. Legal Background 2
B. Facts and Procedural History 5
SUMMARY OF THE ARGUMENT 13
ARGUMENT 16
I. Federal Appellate Courts Lack Jurisdiction Under 28 U.S.C. § 1291 To Review An Order Denying Class Certification After The Plaintiffs Dismiss Their Claims With Prejudice. 16
A. The Voluntary Dismissal Tactic Contravenes This Court's Decision In *Coopers & Lybrand v. Livesay* 16
B. The Voluntary Dismissal Tactic Would Thwart The Discretionary Review Process This Court Created In Fed. R. Civ. P. 23(f). 29
II. Article III's Mootness Doctrine Also Bars Appellate Jurisdiction Under These Circumstances. 34
CONCLUSION 41

TABLE OF AUTHORITIES

Page(s)

Cases

Already, LLC v. Nike, Inc.,
133 S. Ct. 721 (2013) 34, 35

Arizonans for Official English v. Arizona,
520 U.S. 43 (1997) 34

Armstrong v. Marin Marietta Corp.,
138 F.3d 1374 (11th Cir. 1998) 31

Baker v. Microsoft Corp.,
851 F. Supp. 2d 1274 (W.D. Wash. 2012).....8

Berger v. Home Depot USA, Inc.,
741 F.3d 1061 (9th Cir. 2014) 10, 37, 38

Blair v. Equifax Check Servs. Inc.,
181 F.3d 832 (7th Cir. 1999) 24

Bobbitt v. Milberg LLP,
801 F.3d 1066, 1069, 1072 n.5 (9th Cir.
2015), *cert. pending* (No. 15-734).....25

Boeing Co. v. Gemert,
444 U.S. 472 (1980) 40

Bowe v. First of Denver Mortg. Investors,
613 F.2d 798 (10th Cir. 1980) 12, 22

Bowers v. St. Louis S.W. Ry. Co.,
668 F.2d 369 (8th Cir. 1981) 36

Camacho v. Puerto Rico Ports Auth.,
369 F.3d 570 (1st Cir. 2004).....31

Camesi v. Univ. of Pittsburgh Med. Ctr.,
729 F.3d 239 (3d Cir. 2013).....12, 21

Campbell-Ewald Co. v. Gomez,
136 S. Ct. 663 (2016) 34, 39, 40

Castano v. Am. Tobacco Co.,
84 F.3d 734 (5th Cir. 1996) 27

Catlin v. United States,
324 U.S. 229 (1945) 17

Central Trans. Co. v. Pullman's Palace Car Co.,
139 U.S. 24 (1891) 35

Chavez v. Ill. State Police,
251 F.3d 612 (7th Cir. 2001) 12

Cheng v. Commissioner,
878 F.2d 306 (9th Cir. 1989) 23

Cohen v. Beneficial Indus. Loan Corp.,
337 U.S. 541 (1949) 33

Coleman v. Gen. Motors Acceptance Corp.,
296 F.3d 443 (6th Cir. 2002) 27

Comcast Corp. v. Behrend,
133 S. Ct. 1426 (2013) 27, 40

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) ..... *passim*

Deakins v. Monaghan,
484 U.S. 193 (1988) 34

Deposit Guar. Nat'l Bank v. Roper,
445 U.S. 326 (1980) 15, 39, 40, 41

Digital Equip. Corp. v. Desktop Direct, Inc.,
511 U.S. 863 (1994) 18, 27, 29, 30

Druhan v. Am. Mut. Life,
166 F.3d 1324 (11th Cir. 1999) 12, 36

Eisen v. Carlisle & Jacquelin,
370 F.2d 119 (2d Cir. 1966) 3, 22

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974) 16

Evans v. Phillips,
17 U.S. (4 Wheat.) 73 (1817) 36

Flanagan v. United States,
465 U.S. 259 (1984) 17

In re Ford Motor Co. Bronco II Prods. Liab. Litig.,
177 F.R.D. 360 (E.D. La. 1997) 27

Gardner v. Westinghouse Broad. Co,
437 U.S. 478 (1978) 38

Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
903 F.2d 176 (2d Cir. 1990) 12

Himler v. Comprehensive Care Corp.,
993 F.2d 1537 (4th Cir. 1993) 12

Huey v. Teledyne,
608 F.2d 1234 (9th Cir. 1979) 11, 12

Kelly v. Great Atl. & Pac. Tea Co.,
86 F.2d 296 (4th Cir. 1936) 35

Koehler v. Bank of Bermuda Ltd.,
101 F.3d 863 (2d Cir. 1996) 31

Laczay v. Ross Adhesives,
855 F.2d 351 (6th Cir. 1988) 36, 38

Lewis v. Cont'l Bank Corp.,
494 U.S. 472 (1990) 34

Livesay v. Punta Gorda Isles, Inc.,
550 F.2d 1106 (8th Cir. 1977) 14, 17

Midland Asphalt Corp. v. United States,
489 U.S. 794 (1989) 16

Milberg LLP v. Bobbitt,
No. 15-734 24

Mohawk Indus., Inc. v. Carpenter,
558 U.S. 100 (2009) 19, 29, 30

Moses H. Cone Mem. Hosp. v. Mercury Const.,
460 U.S. 1 (1983) 38

New Hampshire v. Maine,
532 U.S. 742 (2001) 22

OBB Personenverkehr AG v. Sachs,
136 S. Ct. 390 (2015) 39

OFS Fitel, LLC v. Epstein, Becker & Green, P.C.,
549 F.3d 1344 (11th Cir. 2008) 37

Page Plus of Atlanta, Inc. v. Owl Wireless, LLC,
733 F.3d 658 (6th Cir. 2013) 23

Rhodes v. E.I. du Pont de Nemours & Co.,
636 F.3d 88 (4th Cir. 2011) 12, 36

Scott v. Family Dollar Stores, Inc.,
733 F.3d 105 (4th Cir. 2012) 9

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.,
559 U.S. 393 (2010) 28

Shannon v. Gen. Elec. Co.,
186 F.3d 186 (2d Cir. 1999) 12

Smith v. Bayer Corp.,
131 S. Ct. 2368 (2011) 8

State v. Dorr,
184 N.W.2d 673 (Iowa 1971) 20

Swint v. Chambers Cnty. Comm'n,
514 U.S. 35 (1995) 30, 31

U.S. Parole Comm'n v. Geraghty,
445 U.S. 388 (1980) 15, 27, 39, 40

United Airlines v. McDonald,
432 U.S. 385 (1977) 9

United States v. Evans,
9 U.S. (5 Cranch) 280 (1809) 35, 36

United States v. Procter & Gamble Co.,
356 U.S. 677 (1958) 15, 35, 37

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) 27

Weingartner v. Union Oil Co.,
431 F.2d 26 (9th Cir. 1970) 24

Wolin v. Jaguar Land Rover North America, LLC,
617 F.3d 1168 (9th Cir. 2010) 7, 8, 11

Ylst v. Nunnemaker,
501 U.S. 797 (1991) 19

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 ..... *passim*

28 U.S.C. § 1292(b) 29, 30, 31

28 U.S.C. § 1292(e) ..... *passim*

28 U.S.C. § 2073 30

CAL. CIV. CODE § 1780 26

815 ILL. COMP. STAT. 505/10a 26

MICH. COMP. LAWS § 445.911 26

N. Y. GEN. BUS. LAW § 349 26

REV. CODE WASH. § 19.86.090 26

Constitutional Provisions

U.S. Const. Art. III, § 2 1

Rules

Fed. R. Civ. P. 23 ..... 8, 11, 18, 25

Fed. R. Civ. P. 23(c)(1)(C) 17, 33

Fed. R. Civ. P. 23(f) ..... *passim*

Fed. R. Civ. P. 41(a)(1)(A)(i) 9

Fed. R. Crim. P. 11(a)(2) 20

Other Authorities

Beisner, John, et al., *Study Reveals US Courts of Appeals Are Less Receptive to Reviewing Class Certification Rulings* (Apr. 29, 2014) https://www.skadden.com/sites/default/files/publications/Study_Reveals_US_Courts_of%20Appeal_Are_Less_Receptive_to_Reviewing_Class_Certification_Rulings.pdf 32

Sullivan, Barry & Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277 (2008) 32

Van Acker, Joe, *Consumers Pulling a Fast One in Cymbalta Case, Eli Lilly Says*, Law360 (Oct. 14, 2015) 12

BRIEF FOR PETITIONER

Petitioner Microsoft Corporation respectfully requests that this Court reverse the judgment of the U.S. Court of Appeals for the Ninth Circuit in No. 12-35946, and remand with instructions to dismiss the appeal.

OPINIONS BELOW

The amended opinion of the Ninth Circuit (Pet. App. 1a) is published at 797 F.3d 607. The relevant order of the district court (Pet. App. 35a) is unpublished.

JURISDICTION

The Ninth Circuit issued its initial decision on March 18, 2015. The Ninth Circuit issued an amended opinion, simultaneously denying Microsoft's petition for rehearing en banc, on July 20, 2015. Pet. App. 1a, 5a. This Court granted certiorari on January 15, 2016. 136 S. Ct. ___. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 2 of the United States Constitution provides in relevant part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States," and to certain "Controversies."

28 U.S.C. § 1291 provides in relevant part: "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."

28 U.S.C. § 1292(e) provides: "The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided under subsection (a), (b), (c), or (d)."

Federal Rule of Civil Procedure 23(f) provides in relevant part: "A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered."

STATEMENT OF THE CASE

This case presents an important jurisdictional issue concerning class action procedure in which the Ninth Circuit has departed from a broad consensus in other circuits. If accepted, the Ninth Circuit's holding would upend settled understandings concerning the final judgment rule and the appealabilty of class certification decisions. It would also thwart a carefully crafted federal rule of civil procedure this Court—with the input of the bench and bar and the approval of Congress—promulgated in 1998 to accommodate appeals from interlocutory class certification decisions.

A. Legal Background

Plaintiffs in putative class actions have long sought the right to take immediate appeals from orders denying class certification. In the 1960's and 1970's, federal courts sometimes allowed such appeals, developing what became known as the "death knell" doctrine. Under that doctrine, several circuits accepted mandatory jurisdiction under 28

U.S.C. § 1291 of appeals from orders denying class certification upon finding that the orders, if left unreviewed, would "end the lawsuit for all practical purposes." *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119, 120 (2d Cir. 1966). That is, if plaintiffs who had been denied class certification demonstrated that the value of their individual clams made it economically imprudent to litigate them on their own, these appellate courts deemed the denial orders to be "final"—and therefore appealable—decisions. *Id.*

In *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), this Court put an end to that practice. In a unanimous opinion, this Court held that plaintiffs may not force an appellate court to hear an immediate appeal from an order denying class certification, even if they show the denial of class certification makes it "economically imprudent" for plaintiffs "to pursue [the] lawsuit to a final judgment and then seek appellate review of [the] adverse class determination." *Id.* at 469-70. Although allowing such appeals "may enhance the quality of justice afforded a few litigants," this Court determined that "this incremental benefit is outweighed" by the need to avoid piecemeal appeals and "potential waste of judicial resources." *Id.* at 473. The death-knell doctrine also operated unfairly "only in favor of plaintiffs," even though the class certification issue "will often be of critical importance to defendants as well." *Id.* at 476.

Two decades after *Livesay*, this Court promulgated Federal Rule of Civil Procedure 23(f). Enacted under this Court's authority to prescribe rules allowing interlocutory appeals not otherwise permitted by statute, *see* 28 U.S.C. § 1292(e), this

rule broadened the circumstances under which federal courts of appeals may "permit an appeal from an order granting or denying class-action certification." Fed. R. Civ. P. 23(f); *compare Livesay*, 437 U.S. at 466 & n.5, 474-75 (referencing prior rules governing the allowance of interlocutory appeals of such orders). But as the Advisory Committee stressed, courts of appeals retain "unfettered discretion" under Rule 23(f) to grant or deny requests for permission to appeal. Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment. Courts typically consider whether an order denying certification "confront[s] the plaintiff with a situation in which the only sure path to appellate review is by proceeding to judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation." *Id.* But courts of appeals have the absolute authority to deny immediate review for any reason. *Id.*

This case presents the issue whether plaintiffs may now do what *Livesay* forbids and Rule 23(f) does not allow: force a federal court of appeals to hear an immediate appeal of an order denying class certification. The Ninth Circuit here held that plaintiffs may secure such a right to appeal, as long as they are willing to stipulate expressly to what was assumed in both *Livesay* and the proceedings leading to Rule 23(f)'s accommodation for death-knell scenarios: that, if unsuccessful on appeal, the named plaintiffs will not go forward on their individual claims. Such a voluntary stipulation, the Ninth Circuit held, transforms an otherwise "inherently interlocutory" order, *Livesay*, 437 U.S. at 470, into a final judgment adverse to the plaintiffs, which satisfies not only Section 1291 but Article III as well.

B. Facts And Proceedings Below

1. In 2005, petitioner Microsoft Corporation released the Xbox 360 console. Widely popular with video-game enthusiasts, the Xbox 360 became the first console of its generation to sell over ten million units in the United States. Among other things, the Xbox 360 spun game discs in its disc drive faster than its competition, creating "a better overall video-gaming experience." CA9 ER 219.[1]

But like any device, the Xbox 360 has limits. As with turntables that spin vinyl records, the Xbox 360 may scratch spinning game discs if moved too quickly in the wrong direction during operation. Microsoft therefore affixed a sticker on the front of each disc drive—covering the disc tray before first use—telling users in three languages: "Do not move console with disc in tray." The user instruction materials likewise warn users to "[r]emove discs before moving the console or tilting it between the horizontal and vertical positions" to avoid "damaging discs." CA9 ER 106, 273, 278.

Nothing in the Xbox 360 warranty insures users against the consequences if they move a device with a disc spinning inside. It promises only that, "under normal use and service," the Xbox 360 "will conform to the printed user instruction materials," which warn against moving the console. CA9 ER 544.

---

[1] In 2013, Microsoft introduced a more advanced successor to the Xbox 360, known as Xbox One. Other companies in intervening years have released new models of their own gaming consoles.

2. In 2007—four years before this case was filed—seven Xbox 360 owners sued Microsoft in separate lawsuits, alleging "the Xbox optical disc drive is unable to withstand even the smallest of vibrations, and that during normal game playing conditions discs spin out of control and crash into internal components, resulting in scratched discs that are rendered permanently unplayable." Pet. App. 6a. Those plaintiffs sought unspecified damages both for the few game owners whose discs had been scratched and for *all* Xbox 360 owners, on the theory that the console's supposed propensity to malfunction reduced the value of *all* Xbox 360 consoles and breached both express and implied warranties.

The cases were consolidated in the U.S. District Court for the Western District of Washington. After the parties developed a full evidentiary record through sixteen months of active discovery, the district court denied class certification. It began by noting that "Plaintiffs have alleged a defect that actually manifests in fewer than one percent of the Xbox consoles sold." J.A. 22; *see also* Pet. App. 6a ("only 0.4% of Xbox users have reported disc scratching"). And evidence showed user accidents or misuse caused at least some of the scratched discs reported. *See* J.A. 22-23 (describing scenarios of user-caused scratched discs). "Whether each user's actions constituted misuse, and whether his or her use/misuse caused the damage, would present individual issues of fact for the jury." J.A. 23. Accordingly, the district court reasoned that "[t]he requirements of individual attention to each plaintiff on issues of law and fact make this case an inappropriate candidate for class-action resolution." J.A. 24.

The plaintiffs filed a petition in the Ninth Circuit seeking interlocutory review under Rule 23(f). They argued the class certification denial "constitute[d] the 'death knell' for this litigation" because their individual claims were too small to justify litigating on their own to final judgment. *Torres v. Microsoft Corp.*, Ninth Cir. No 09-80160, Pet. for Permission to Appeal Under Fed. R. Civ. P. 23(f) [Dkt. 1] at 8.

The Ninth Circuit denied the petition, J.A. 25, and plaintiffs resolved their individual claims through an agreement with Microsoft. The district court then dismissed the cases with prejudice.

3. In 2011, the same lawyers as in the original consolidated litigation filed a new lawsuit—again in the U.S. District Court for the Western District of Washington—on behalf of respondents, a handful of Xbox 360 owners who did not join in the original action. Respondents pressed the same claims as their predecessors, and they likewise requested certification of a nationwide class consisting of all owners of Xbox 360 consoles, without regard to whether they ever experienced a scratched disc.[2] They argued the Ninth Circuit's intervening decision in *Wolin v. Jaguar Land Rover North America, LLC*, 617 F.3d 1168 (9th Cir. 2010)—holding that proof of the manifestation of a defect is not a prerequisite to class certification, and the typicality requirement in

---

[2] Respondents originally sought to certify a scratched-disc subclass as well. But they abandoned the scratched-disc subclass on appeal, Pltfs. CA9 Br. 18-20, recognizing the impossibility of proving on a class-wide basis that the console, as opposed to user behavior, caused any particular disc scratch.

Fed. R. Civ. P. 23 "can be satisfied despite different factual circumstances surrounding the manifestation of the [alleged] defect," *id.* at 1175—now allowed certification of their proposed class.

Microsoft replied that *Wolin* did not change the law relevant to this case. As a result, Microsoft maintained, the district court should show comity to the decision in the earlier case, which rested on the same allegations and evidence as this one. *See Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2381 (2011) ("[W]e would expect federal courts to apply principles of comity to each other's class certification decisions when addressing a common dispute."). Further, Microsoft explained, *Wolin* does not apply where, as here, only a minuscule fraction of the proposed class suffered any harm in the form of a manifestation of an alleged defect, and individual proof would be necessary to determine whether any particular user's console failed to conform to the printed user instructions and thus breached the warranty.

The district court struck respondents' class allegations. It found the reasoning in the first class certification denial (by a different judge) persuasive and that "nothing in *Wolin* undermine[d] [that] causation analysis." *Baker v. Microsoft Corp.*, 851 F. Supp. 2d 1274, 1280 (W.D. Wash. 2012).

4. Invoking Rule 23(f), respondents asked for permission to appeal the district court's order striking their class allegations.[3] J.A. 108-09. As in

---

[3] Courts agree that Rule 23(f) applies not only to orders denying motions for class certification but also to orders striking class allegations because the two are "functional equivalent[s]."

the previous case, respondents' counsel asserted that "[t]he small size of Plaintiffs' claims makes it economically irrational to bear the cost of litigating this case to final judgment," such that, unless reversed, "the district court's order effectively kills the case." J.A. 118.

The Ninth Circuit denied the petition. Pet. App. 10a.

5. Upon receipt of the Ninth Circuit's order, respondents chose not to prosecute their individual claims. Instead, they promptly moved the district court to dismiss their claims with prejudice. Respondents explained why they wanted such an order: "After the Court has entered a final judgment, Plaintiffs intend to appeal the Court's March 27, 2012 order (Dkt. 32) striking Plaintiffs' class allegations." J.A. 122-123.

Microsoft stipulated that the district court could grant respondents' motion to dismiss their claims, as they had the right to dismiss voluntarily under Fed. R. Civ. P. 41(a)(1)(A)(i). Pet. App. 36a. Microsoft made clear, however, it believed "Plaintiffs will have no right to appeal the Court's Order striking Plaintiffs' class allegations after entry of their requested dismissal." *Id.*

Scott v. Family Dollar Stores, Inc., 733 F.3d 105, 110 n.2 (4th Cir. 2012) (quoting *In re Bemis Co.*, 279 F.3d 419, 421 (7th Cir. 2002)); *see also United Airlines v. McDonald*, 432 U.S. 385, 387-93 (1977) (repeatedly characterizing order striking class allegations as a "denial of class certification").

The district court granted the dismissal with prejudice, "reserving to all parties their arguments as to the propriety of any appeal." Pet. App. 36a-37a.

6. The Ninth Circuit assumed jurisdiction over respondents' appeal and reversed. Relying on its decision months earlier in *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061 (9th Cir. 2014), the court of appeals reasoned that "in the absence of a settlement, a stipulation that leads to a dismissal with prejudice does not destroy the adversity in that judgment necessary to support an appeal" of a class certification denial. Pet. App. 12a (quoting *Berger*, 741 F.3d at 1064). This is so, according to respondents' understanding of Ninth Circuit law, because reversal under these circumstances "revive[s]" the named plaintiffs' individual claims—meaning the voluntary dismissal is really only a *conditional* abandonment of the claims. BIO 16 n.4 (citing *Concha v. London*, 62 F.3d 1493, 1507-08 (9th Cir. 1995)).

Microsoft argued at length that *Berger*'s tolerance for such a procedure is at odds with *Livesay* and Rule 23(f)'s conferral of unfettered discretion to allow or deny interlocutory appeals of class certification orders. As Microsoft put it, plaintiffs may not manufacture an immediate right to appeal simply by offering formal confirmation that, if upheld on appeal, the class certification denial would in fact sound the "death knell" of their claims. Def. CA9 Br. 4-16. But the Ninth Circuit responded simply that *Berger* controlled, refusing to question that prior holding—even though it never cited, let alone grappled with, *Livesay*. Pet. App. 11a-12a; *see also Berger*, 741 F.3d at 1065-66.

Turning to the class certification denial, the Ninth Circuit concluded the district court "abused its discretion when it struck the class action allegations." Pet. App. 19a. Relying on *Wolin*, the court of appeals held that Rule 23 allows class certification when plaintiffs characterize their claims as turning on "a common factual question—is there a defect?" and on whether that defect breaches a warranty. *Id.* 16a. Under this reasoning, it does not necessarily make any difference whether "the defect here may never manifest" or if it manifests for different users for different reasons. *Id.* 17a.

At the same time, the Ninth Circuit acknowledged that "Microsoft makes several arguments" in addition to the one adopted by the district court "to show that certification of this class would violate Federal Rule of Civil Procedure 23." Pet. App. 18a. The Ninth Circuit thus emphasized it was "express[ing] no opinion on whether the specific common issues identified in this case are amenable to adjudication by way of a class action, or whether plaintiffs should prevail on a motion for class certification." *Id.* 19a. Instead, it "suffice[d] for now to hold that . . . the district court misread *Wolin*" and to remand for further proceedings concerning the viability of respondents' proposed class. *Id.* 18a, 19a.

7. Microsoft sought rehearing en banc. It argued that the Ninth Circuit's holding allowing plaintiffs to create appellate jurisdiction over class certification denials by voluntarily dismissing their claims conflicted with prior circuit precedent. Specifically, in *Huey v. Teledyne*, 608 F.2d 1234 (9th Cir. 1979), the Ninth Circuit held, shortly after *Livesay*, that when "the denial of class certification cause[s a]

failure to prosecute" for death-knell reasons, the dismissal precludes appellate review of the denial of class certification. *Id.* at 1240. Microsoft also explained that the Ninth Circuit's rule conflicts with the law in all but one of the other circuits to have considered this issue. *See Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 245 (3d Cir. 2013); *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 99-100 (4th Cir. 2011); *Himler v. Comprehensive Care Corp.*, 993 F.2d 1537 (4th Cir. 1993) (unpublished opinion); *Chavez v. Ill. State Police*, 251 F.3d 612, 628-29 (7th Cir. 2001); *Bowe v. First of Denver Mortg. Investors*, 613 F.2d 798, 800 (10th Cir. 1980); *Druhan v. Am. Mut. Life*, 166 F.3d 1324, 1326 (11th Cir. 1999).[4]

The court of appeals responded by amending its opinion to insert a footnote trying to harmonize its jurisdictional holding with *Huey*. Pet. App. 4a-5a, 12a n.4. But it denied the petition without further comment. *Id.* 5a.

8. This Court granted certiorari. 136 S. Ct. ____ (2016).

---

[4] Only the Second Circuit has previously condoned the voluntary dismissal tactic. *See Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 178-79 (2d Cir. 1990). But later Second Circuit opinions—including one by then-Judge Sotomayor—have suggested *Gary Plastic* might be infirm, *see Shannon v. Gen. Elec. Co.*, 186 F.3d 186, 193 (2d Cir. 1999), and no other plaintiff in that circuit appears to have used the tactic. In the Ninth Circuit, by contrast, plaintiffs have started regularly deploying it. *See* Pet. 17 n.2 (collecting cases); Joe Van Acker, *Consumers Pulling a Fast One in Cymbalta Case, Eli Lilly Says*, Law360 (Oct. 14, 2015).

SUMMARY OF THE ARGUMENT

A federal court of appeals lacks jurisdiction to review an order denying class certification after the named plaintiffs dismiss their claims with prejudice. If—as respondents maintain on appeal—a reversal of the class certification decision would somehow bring the plaintiffs' dismissed claims back to life, then there is no "final" district court decision and no basis for an appeal under 28 U.S.C. § 1291. Alternatively, if, as the dismissal order indicates, respondents unconditionally abandoned their claims to create finality, then the case is moot under Article III.

I. Insofar as the Ninth Circuit held that reversal of the class certification order reinstates respondents' claims, their voluntary dismissal ploy simply resuscitates the death-knell doctrine this Court abolished in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). The only procedural difference between the two scenarios is that respondents generated a dismissal order memorializing their decision to forego their individual claims if unsuccessful on appeal. But Section 1291 requires a practical, not technical, approach to finality. And if plaintiffs' claims will spring back to life upon a reversal having nothing to do with the merits of those claims, the dismissal order here is nothing more than meaningless formalism. Plaintiffs who invoked the death-knell doctrine likewise abandoned any ability to pursue their individual claims if unsuccessful on appeal. Undertaking that conditional risk was not enough to generate finality there; nor is it sufficient here.

Further, respondents' voluntary dismissal tactic presents all three jurisprudential pitfalls this Court identified in *Livesay*. First, the tactic virtually

guarantees piecemeal appellate review. Second, it disrupts the proper balance between district and appellate courts, under which the former perform a valuable winnowing function for the latter. Third, like the death-knell doctrine, the voluntary dismissal tactic gives plaintiffs an unfair advantage in class actions—giving them an option for immediate review of class certification decisions defendants lack, even though class certification decisions are of equally vital importance to all parties.

This Court's post-*Livesay* adoption of Fed. R. Civ. P. 23(f) confirms the impropriety of respondents' appeal. Rule 23(f) deals with the very situation respondents claimed to face here, giving courts of appeals the authority in death-knell scenarios to accept interlocutory appeals of class certification orders. But this power is wholly discretionary. Allowing plaintiffs to *force* appellate courts to review such orders whenever they are willing to gamble their individual claims on the appeal would strip courts of appeals of the discretion Rule 23(f) confers. More generally, it would thwart Congress's determination in 28 U.S.C. § 1292(e) that this Court's rulemaking process—not manipulation of Section 1291—is the proper way to manage the jurisdictional relationship between trial and appellate courts.

II. If, contrary to their belief that their claims would spring back to life upon reversal, respondents' voluntary dismissal actually generated a "final decision"—one where respondents' claims could not be revived even if the procedural order is reversed—then this case is moot. Article III's "case or controversy" requirement demands that plaintiffs maintain a "personal stake" throughout the pendency

of litigation. If an appellate court would be unable to affect the legal rights of the plaintiff, the case is moot. It has thus long been a "familiar rule that a plaintiff who has voluntarily dismissed his complaint may not [appeal from that dismissal]." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 680 (1958).

The only circumstance in which a plaintiff's voluntary dismissal does not sacrifice Article III adversity is the unusual circumstance when a prior interlocutory order effectively decides the plaintiff's claim on the merits, rendering the dismissal nothing more than a formal embodiment of the plaintiff's loss and a ministerial step on the way to an inevitable appeal. But here, the opposite is true. The district court's order striking respondents' class allegations had no effect whatsoever on the merits of their claims.

Respondents have never contended a "case or controversy" exists based on any relationship they have to the proposed class they sought to represent, so they may not press that position now. In any event, any such argument would fail. When named plaintiffs' claims are mooted "without their consent," they may retain a personal stake in class certification sufficient to support an appeal from a denial of that request. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980); *see also U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 402 (1980). But here, respondents' claims became moot because they voluntarily abandoned them. Nothing deprived respondents of a full and fair opportunity to pursue class certification. So there is no basis for relaxing Article III's adversity requirement to find a case or controversy here.

ARGUMENT

I. Federal Appellate Courts Lack Jurisdiction Under 28 U.S.C. § 1291 To Review An Order Denying Class Certification After The Plaintiffs Dismiss Their Claims With Prejudice.

The voluntary dismissal tactic respondents employed here contravenes this Court's application of 28 U.S.C. § 1291 in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). If condoned, the tactic would also upend the discretionary review system for class certification decisions this Court promulgated in Fed. R. Civ. P. 23(f).

A. The Voluntary Dismissal Tactic Contravenes This Court's Decision In *Coopers & Lybrand v. Livesay*.

1. Except for narrow exceptions not relevant here, 28 U.S.C. § 1291 limits the jurisdiction of federal courts of appeals to "final decisions" of district courts. "Restricting appellate review to 'final decisions' prevents the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974). "The final judgment rule also lessens the risk that appellate courts will render abstract rulings on questions of law presented in an insufficiently developed factual context. And it reduces the likelihood that appellate courts will devote time and energy to the resolution of issues that may prove to be immaterial to the ultimate disposition of the case." Br. for the United States at 10-11, *Midland Asphalt Corp. v. United States*, 489

U.S. 794 (1989) (No. 87-1905) (summarizing case law). Finally, the final judgment rule eliminates the "delays," *Catlin v. United States*, 324 U.S. 229, 234 (1945), caused by "costly and time-consuming [interlocutory] appeals," *Flanagan v. United States*, 465 U.S. 259, 264 (1984).

In *Livesay*, this Court applied these principles to assess the appealability of orders denying class certification. The named plaintiffs allegedly lost $2,650 due to the defendant's securities-law violations and sought to represent a class of similarly situated shareholders. Although the district court at first granted the plaintiffs' class certification motion, it later decertified the class. The Eighth Circuit then assumed jurisdiction over plaintiffs' interlocutory appeal, deeming the decertification order "final" because it "sound[ed] the 'death knell' of the action." *Livesay v. Punta Gorda Isles, Inc.*, 550 F.2d 1106, 1109 (8th Cir. 1977). That is, the court of appeals credited the plaintiffs' assertion "that they [would] not pursue their individual claim if the decertification order stands." *Id.* at 1110.

This Court reversed. Writing for a unanimous Court, Justice Stevens explained it makes no difference whether plaintiffs in a putative class action "will not pursue their individual claim[s] if the decertification order stands." *Id.* at 466 n.7. Indeed, the Court accepted that "refusal to certify a class" may sometimes "induce a plaintiff to abandon his individual claim." *Id.* at 470. But orders denying class certification are still "inherently interlocutory"; they are always subject to revision before final judgment. *Id.*; *see also* Fed. R. Civ. P. 23(c)(1)(C). Even if "allowing an immediate appeal from those

orders may enhance the quality of justice afforded a few litigants, . . . this incremental benefit is outweighed" by the "serious debilitating effect" mandatory appellate jurisdiction would have on the orderly administration of justice. *Id.* at 473; *see also Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994) (elaborating this balancing). Accordingly, "the *only sure path* to appellate review" for plaintiffs denied class certification "is by proceeding to final judgment on the merits of [their] individual claim[s]," and, if they succeed, appealing the order denying class certification. Fed. R. Civ. P. 23 advisory committee's note to 1998 amendment (emphasis added); *accord Livesay*, 437 U.S. at 469.

2. The Ninth Circuit's holding in this case flouts *Livesay*. In proceedings below, respondents declared the district court's refusal to certify a class was the "death knell" of their case. J.A. 118 (Pet. for Permission to Appeal Under Fed. R. Civ. P. 23(f) at 17). They then dismissed their claims for no reason other than "to appeal the [order] striking Plaintiff's class allegations" without a trial on their individual claims. Pet. App. 36a. And—critically—respondents contend that if they are successful on appeal, their now-dismissed individual claims will be "revived" on remand, BIO 16 n.4, placing them in precisely the same position they would have occupied if they had been allowed to pursue an interlocutory appeal, the individual claims had been stayed pending that appeal, and they then prevailed. This scheme simply resuscitates the discredited death-knell doctrine.

Respondents disagree. They protest that *Livesay* does not control here because (a) the district court formally entered a dismissal order embodying the

death knell respondents themselves rang and (b) they "risk[] los[ing] their claims" if they lose their bet to secure a reversal of the class certification denial on appeal. BIO 17-18, 21. But neither of these arguments differentiates this case from *Livesay*.

a. This Court "has long given" the concept of "finality" in Section 1291 a "practical rather than a technical construction." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). It is therefore vital to focus on the substance of what respondents ask for in this appeal, not simply on the formality that they stipulated to a dismissal with prejudice as a means of taking the appeal.

Respondents do not—and could not—argue on appeal that the district court erred in dismissing their claims with prejudice. That, after all, is exactly what respondents asked the district court to do. Pet. App. 36a-37a. Instead, respondents essentially ask the appellate system to "look through" the voluntary dismissal, *Ylst v. Nunnemaker*, 501 U.S. 797, 801-04 (1991), to enable them to "challenge[]" the district court's prior order "strik[ing] class claims." BIO 18; *see also* Pet. App. 36a. If that challenge succeeds, respondents urge that their claims spring back to life, even though the class certification decision had nothing to do with the merits of their claims.

Plaintiffs should not have the right to manufacture appellate jurisdiction in this manner. An order denying class certification is "inherently interlocutory" and, therefore, not subject to review before the named plaintiffs' substantive claims are litigated to conclusion on their merits. *Livesay*, 437 U.S. at 470. Simply boot-strapping a class

certification denial to an order voluntarily dismissing the plaintiffs' claims—while insisting upon the right to resume litigating those claims if successful on appeal—should not change that bedrock principle.

Put another way, respondents seek to create in civil procedure something akin to the process provided in Fed. R. Crim. P. 11(a)(2). That rule allows criminal defendants to enter "conditional" guilty pleas while retaining the right to appeal adverse pretrial orders, such as orders denying motions to suppress. But one of the reasons Criminal Rule 11(a)(2) was created is because a conditional plea—inasmuch as it allows defendants to withdraw their prior consent to judgment if successful on appeal—"does not have complete finality." Fed. R. Crim. P. 11 advisory committee's note to 1983 amendment; *see also State v. Dorr*, 184 N.W.2d 673, 674 (Iowa 1971) (explaining that an appeal pursuant to a conditional plea is really an "interlocutory appeal"). And the civil rules contain no "conditional dismissal" counterpart to Criminal Rule 11(a)(2).[5]

Finally, just as with the death-knell doctrine, there would be no way to tolerate the voluntary dismissal tactic in the context of this case without

---

[5] Even if they did, it would not help respondents. A criminal defendant who consents to a conditional judgment against him retains a right to appeal a pretrial order only if that right is reserved in writing "with the consent of the court and the government." Fed. R. Crim. P. 11(a)(2). Respondents obtained no consent here. To the contrary, Microsoft told them and the district court, "Plaintiffs will have no right to appeal the Court's Order striking Plaintiffs' class allegations after entry of their requested dismissal." Pet. App. 36a.

enabling further incursions on Section 1291's final judgment rule. This Court noted in *Livesay* that Section 1291 applies to class certification orders the same way it applies to other pretrial orders. 437 U.S. at 470, 474. Consequently, "if the 'death knell' doctrine has merit, it would apply equally to the many interlocutory orders in ordinary litigation—rulings on discovery, on venue, on summary judgment—that may have such tactical economic significance that a defeat is tantamount to a 'death knell' for the entire case." *Id.* at 470.

So too with the voluntary dismissal tactic. If courts "were to allow such a procedural sleight-of-hand to bring about finality," there would be "nothing to prevent [plaintiffs] from employing such a tactic to obtain review of discovery orders, evidentiary rulings, or any of the myriad decisions a district court makes before it reaches the merits." *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 245-46 (3d Cir. 2013). This type of onslaught is exactly what Section 1291 and *Livesay* have long been designed to prevent.

b. The "risk" respondents claim to be taking by insisting on an immediate appeal does not separate this case from *Livesay* either. The very foundation of the death-knell doctrine was a requirement that plaintiffs prove "they would not pursue their claims individually" absent class certification. *Livesay*, 437 U.S. at 466; *see also* Resp. Br. 16, *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) (Nos. 76-1836 & 76-1837) (stressing that the plaintiffs "will have no opportunity to appeal at a later date because they

cannot proceed on their individual claim").[6] And this Court in *Livesay* explicitly took this "assumption" as a given. 437 U.S. at 470. Practically speaking, therefore, respondents remain in the identical position as the plaintiffs in *Livesay*.

Indeed, the most respondents can say as a result of the dismissal order they procured is that "[i]f [they] had failed to convince the court of appeals to reverse the district court's striking of the class claims, [they] would have lost [their] individual claims permanently." BIO 21. But plaintiffs under the death-knell doctrine put themselves in the same position. When a court of appeals accepted a plaintiff's death-knell argument but affirmed the denial of class certification, the rule of judicial estoppel—which "prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase," *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000))—would have barred the plaintiff from going forward on his individual claims just the same. Respondents' willingness to stipulate to this bargain before appealing is nothing more than meaningless formalism. *See Bowe v. First of Denver Mortg. Inv.*, 613 F.2d 798, 800 (10th Cir. 1980).

---

[6] In the first opinion to accept the death-knell doctrine, the Second Circuit put it this way: "The alternatives are to appeal now or to end the lawsuit for all practical purposes. [The] order [denying class certification] if unreviewed, will put an end to the action." *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119, 120 (2d Cir. 1966).

Even the Ninth Circuit has recognized outside the context of class actions that plaintiffs cannot satisfy Section 1291's finality requirement simply by risking dismissal of their claims if unsuccessful on appeal. In *Cheng v. Commissioner*, 878 F.2d 306 (9th Cir. 1989), after the district court entered partial summary judgment against the petitioner, he stipulated to the dismissal of his remaining claims—on the condition they would spring back to life if he successfully challenged the partial summary judgment on appeal. The Ninth Circuit held petitioner's "willing[ness] to stipulate to the dismissal of the claims (contingent upon the affirmance of the lower court's judgment)" was "insufficient" to create a final judgment. *Id.* at 310-11. As the Sixth Circuit put it in an equivalent ruling, "finality either exists at the time an appellate court decides the appeal or it does not. . . . If the possibility of finality alone establishes finality, the word has no meaning, and § 1291 serves little purpose." *Page Plus of Atlanta, Inc. v. Owl Wireless, LLC*, 733 F.3d 658, 662 (6th Cir. 2013) (Sutton, J.). This principle must apply equally to plaintiffs in class actions.

3. Respondents' voluntary dismissal tactic is not only functionally identical to the death-knell doctrine, it also presents all three jurisprudential pitfalls this Court identified in *Livesay*.

a. Just as the "death knell" doctrine threatened to generate "multiple appeals in every complex case," *Livesay*, 437 U.S. at 474, the voluntary dismissal tactic virtually guarantees piecemeal appellate review. If anything, it promises to generate *more* interruptive appeals mid-way through cases than the death-knell doctrine did. The death-knell doctrine at

least required plaintiffs to persuade judges that the class certification denial genuinely made proceeding on their individual claims economically imprudent. *See Livesay*, 437 U.S. at 473. By contrast, the voluntary dismissal tactic lets plaintiffs choose *entirely for themselves* when they would like to take an interlocutory appeal from a class certification denial, without regard to whether the value of their individual claims in relation to their resources and the probable cost of the litigation would really keep them from pursuing those claims. *Id.* at 466. So long as they are willing to risk losing their claims if unsuccessful on appeal—a risk they would readily take, for example, if they lack confidence in their substantive claims and hope to avoid a trial—plaintiffs may employ the tactic to force immediate review. And experience shows many will be willing to take this risk.[7]

One need look no further than this case to appreciate how the voluntary dismissal tactic

---

[7] As courts have noted, plaintiffs' counsel sometimes hear "a bell that is not tolling." *Blair v. Equifax Check Servs. Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (Easterbrook, J.); *see also Weingartner v. Union Oil Co.*, 431 F.2d 26, 29 (9th Cir. 1970) (rejecting plaintiffs' argument that denial of class certification sounded death knell when individual claims were worth $353,700 if they prevailed at trial). Therefore, as one plaintiffs' class action law firm recently explained, "[i]f the sleight-of-hand employed here is permitted, . . . plaintiffs represented by experienced class action counsel would have a vehicle to evade merits litigation and obtain an immediate appeal even though counsel has the resources to prosecute the case to the true final judgment that the rules require." Pet. for Cert. at 23, *Milberg LLP v. Bobbitt*, No. 15-734.

undermines Section 1291's goal of minimizing piecemeal litigation. After asserting jurisdiction of this appeal, the Ninth Circuit noted "Microsoft makes several arguments" besides the one adopted by the district court "to show that certification of this class would violate Federal Rule of Civil Procedure 23." Pet. App. 18a.[8] But the Ninth Circuit considered only one of those arguments, ultimately "express[ing] no opinion on whether the specific common issues identified in this case are amenable to adjudication by way of a class action, or whether plaintiffs should prevail on a motion for class certification." *Id.* 19a; *see also Bobbitt v. Milberg LLP*, 801 F.3d 1066, 1069, 1072 n.5 (9th Cir. 2015), *cert. pending* (No. 15-734) (same).

As a result, the Ninth Circuit has left the district court free to deny class certification yet again on remand. If that occurs—as Microsoft believes it should—respondents may voluntarily dismiss again

---

[8] To take but one example, the Xbox 360 warranty promised the console "under normal use and service" would "substantially conform to the printed user instruction materials," CA9 ER 544, and those materials warned users not to move or tilt the console with a disc in the drive "[t]o avoid jamming the disc drive and damaging discs," CA9 ER 106, 273, 278. Microsoft submitted evidence that "to scratch a game disc, someone must directly move the console, intentionally or otherwise, while the disc is spinning, with movements that are well beyond what would be expected [during normal use]." CA9 ER 159. Individual proof is therefore necessary to determine whether Microsoft breached this warranty as to any particular console owner, i.e., whether the console failed to conform to instruction materials under normal use, especially given evidence showing only 0.4% of Xbox users reported scratched discs.

and force yet another appeal rather than test their claims on the merits. If the Ninth Circuit reverses again, that process could repeat itself—and continue to repeat indefinitely. This potentially endless cycle would enshrine piecemeal appeals as a "serious" threat in every putative class action. *Livesay*, 437 U.S. at 474. Far better to require plaintiffs, if they wish, to make a complete record concerning all of the "factual and legal issues" enmeshed in the question of class certification and then, if necessary, take a unified appeal from a final judgment on the merits of their claims, as *Livesay* mandates. *Id.* at 469 (quotation marks and citation omitted).

This case likewise illustrates how plaintiffs—if permitted to do so—will force piecemeal appellate litigation even when they have ample financial incentives to take their individual claims to trial on the merits. Respondents alleged state consumer protection claims that offered the possibility of not only actual damages but also attorneys' fees and penalties.[9] Such statutory "provision[s] for the award

---

[9] *See* J.A. 58 ¶ 130 (citing CAL. CIV. CODE § 1780, which allows "[a]ctual damages," "punitive damages," and "court costs and attorney's fees"); J.A. 59 ¶ 139 (invoking 815 ILL. COMP. STAT. 505/10a, which allows "actual economic damages or any other relief which the court deems proper," including punitive damages, and "attorney's fees and costs"); J.A. 61-62 ¶ 154 (citing MICH. COMP. LAWS § 445.911, which allows "actual damages . . . together with reasonable attorneys' fees"); J.A. 67 ¶ 175 (citing N. Y. GEN. BUS. LAW § 349, allowing recovery of "actual damages," trebling "up to one thousand dollars," and "attorney's fees"); J.A. 69 ¶ 190 (citing REV. CODE WASH. § 19.86.090, which allows recovery of "actual damages," "costs . . . including a reasonable attorney's fee," and treble damages).

of attorney's fees and costs to successful plaintiffs eliminate[d] any potential financial bar to pursuing individual claims." *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443, 449 (6th Cir. 2002); *accord Castano v. Am. Tobacco Co.*, 84 F.3d 734, 747 (5th Cir. 1996); *In re Ford Motor Co. Bronco II Prods. Liab. Litig.*, 177 F.R.D. 360, 375 (E.D. La. 1997). Yet respondents still refused to pursue their claims on the merits without immediate review of the class certification issue.

b. The voluntary dismissal tactic similarly frustrates Section 1291's goal of "efficient administration of justice in the federal courts." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867-68 (1994). District courts are designed to build records and winnow the questions a case presents. In the crucible of trial-court litigation, many issues that appear pressing at the outset of a case become non-dispositive or even irrelevant "after a long trial on the merits." *Id.* at 872.

This is particularly so in class actions, where a plaintiff brings "two separate issues for judicial resolution. One is the claim on the merits; the other is the claim that he is entitled to represent a class." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 402 (1980). More now than ever, the latter claim—propriety of class certification—can raise difficult and hotly contested issues. *See, e.g., Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). As a result, a class certification denial may turn on complex factual and legal determinations. But if named plaintiffs thereafter litigate their individual claims to conclusion and lose on the merits, even the most

intricate issues associated with class status become irrelevant—and therefore unnecessary for any appellate court to consider.

The death-knell doctrine deprived appellate courts of the ability to allow litigation to run its course in this manner, thereby disrupting "the appropriate relationship" between district and appellate courts. *Livesay*, 437 U.S. at 476. The voluntary dismissal tactic would have precisely the same effect, mandating appellate review of procedural orders whose correctness might never even matter. This Court should not foist such an unwarranted and burdensome obligation upon the already busy courts of appeals.

c. Like the death-knell doctrine, the voluntary dismissal tactic gives plaintiffs an unfair advantage in class actions. Just as plaintiffs worry a denial of class certification will sound the death knell for their case, "the class issue—whether to certify, and if so, how large the class should be—will often be of critical importance to defendants as well. Certification of a large class may so increase a defendant's potential damages liability and litigation costs that [the defendant] may find it economically prudent to settle and to abandon a meritorious defense." *Livesay*, 437 U.S. at 476; *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class . . . places pressure on the defendant to settle even unmeritorious claims."). Yet just like the death-knell doctrine, the voluntary dismissal tactic ignores the symmetrical impacts of class certification decisions and "operates only in favor of plaintiffs." *Livesay*, 437 U.S. at 476. This one-way ratchet

distorts litigation and settlement incentives in these high-stakes cases.

B. The Voluntary Dismissal Tactic Would Thwart The Discretionary Review Process This Court Created In Fed. R. Civ. P. 23(f).

1. In construing Section 1291, this Court also has considered the degree to which "[e]ffective appellate review" of the type of order at issue "can be had by other means," *Mohawk Indus.*, 558 U.S. at 114, and whether allowing an appeal as of right would "circumvent[]"those means, *Livesay*, 437 U.S. at 475. In *Mohawk Industries*, for example, the defendant argued that orders finding communications unprotected under the attorney-client privilege should be deemed "final" under Section 1291's collateral-order doctrine. This Court rejected the argument, emphasizing that litigants already had other "established mechanisms for appellate review" of such orders. *Id.* at 112. Most notably, 28 U.S.C. § 1292(b) allows courts of appeals to review pretrial orders when they involve "a controlling question of law" that is reasonably debatable and whose prompt resolution "may materially advance the ultimate termination of the litigation." Even though those mechanisms are purely discretionary, their existence counseled a "narrow" reading of Section 1291 because they go "a long way toward" alleviating any concern that, absent a broader construction of the statute's finality requirement, "consequential" or otherwise "serious errors" would not be "promptly correct[ed]." *Mohawk Indus.*, 558 U.S. at 111-12.

Likewise, in *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994), this Court noted

that the statutory "safety valve" in Section 1292(b) would enable appellate courts immediately to review orders of the sort at issue (orders refusing to enforce settlement agreements) when "serious" enough to take them "out of the ordinary run." *Id.* at 883. This statutory authority is "not a panacea." *Id.* at 883 n.9. But "allowing courts to consider the merits of individual claims," this Court explained, is nevertheless a "better vehicle" for effective appellate review than "the blunt, categorical instrument" of Section 1291—because the latter would have swelled appellate dockets with challenges to mundane applications of settled law, many of which will wash out if litigation in the trial court were required to run its full course. *Id.* at 883.

This Court's rulemaking power under 28 U.S.C. § 1292(e) similarly bears on whether an order is reviewable under Section 1291. Section 1292(e) allows this Court, with the subsequent approval of Congress, "to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided under [Section 1292(b)]." As a structural matter, this power "counsel[s] resistance to expansion of appellate jurisdiction" in a manner that can be addressed through rulemaking authority. *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 48 (1995); *see also Mohawk Indus.*, 558 U.S. at 113-14 (reiterating this cautionary note); *id.* at 114-19 (Thomas, J., concurring in part and concurring in the judgment) (same in even stronger terms).

Indeed, "the rulemaking process has important virtues. It draws on the collective experience of the bench and bar, *see* 28 U.S.C. § 2073, and it facilitates the adoption of measured, practical solutions."

Mohawk Indus., 558 U.S. at 114. In contrast to finding mandatory jurisdiction under Section 1291, this Court's rulemaking power also enables the creation of systems of *discretionary* review, enabling appellate courts to maintain control over their dockets. This Court, therefore, should hesitate to allow an "immediate appeal" as of right when a rulemaking, "with the opportunity for full airing it provides," offers a more finely tuned path to review the type of order at issue. *Id.*

2. Against this backdrop, the Ninth Circuit's expansion of Section 1291 here is even less justifiable than the enlargements this Court rejected in *Mohawk Industries*, *Digital Equipment*, and *Swint*. As noted above, a litigant invoking Section 1292(b) as a route to appellate review must first persuade a district court to certify that the order satisfies the statute's "controlling question of law" and material advancement requirements. 28 U.S.C. § 1292(b). This certification authority "is meant to be used sparingly, and appeals under it are, accordingly, hen's-teeth rare." *Camacho v. Puerto Rico Ports Auth.*, 369 F.3d 570, 573 (1st Cir. 2004); *accord Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 865 (2d Cir. 1996); *Armstrong v. Marin Marietta Corp.*, 138 F.3d 1374, 1387 (11th Cir. 1998).

By contrast, Rule 23(f)—promulgated after *Livesay* under this Court's Section 1292(e) authority—enables plaintiffs in putative class actions to bypass Section 1292(b)'s requirement of district court certification. Under Fed. R. Civ. 23(f), a named plaintiff may petition a court of appeals directly to grant discretionary, interlocutory review of a class certification denial for *any* reason—including that

her "individual claim . . . standing alone, is far smaller than the costs of litigation." Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment. In other words, Rule 23(f) addresses the exact situation respondents claimed to face here, i.e., where "[t]he small size of Plaintiffs' claims makes it economically irrational to bear the cost of litigating this case to final judgment." J.A. 118 (Pet. for Permission to Appeal Under Fed. R. Civ. P. 23(f) at 17). And plaintiffs in this situation regularly use the innovation of Rule 23(f) to their advantage, securing interlocutory appeals over twenty percent of the time.[10]

At the same time, the Advisory Committee specifically considered and rejected a proposal that would have allowed appeals as of right from class certification decisions, concluding "it would lead to abuse." Advisory Committee on Civil Rules, Minutes (Nov. 9, 1995). The Committee explained that "many suits with class-action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings." Fed. R. Civ. P. 23(f) advisory committee's

---

[10] *See* Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 290 Table 1 (2008) (22% of plaintiffs' petitions granted from 1998 to 2006); John Beisner, et al., *Study Reveals US Courts of Appeals Are Less Receptive to Reviewing Class Certification Rulings* (Apr. 29, 2014) (20.5% of plaintiffs' petitions granted from 2006 through 2013), https://www.skadden.com/sites/default/files/publications/Study_Reveals_US_Courts_of%20Appeal_Are_Less_Receptive_to_Reviewing_Class_Certification_Rulings.pdf.

note to 1998 amendment. And it bears remembering that a district court's order denying class certification is "inherently tentative"; it may always be "altered or amended at any time before the decision on the merits." *Livesay*, 437 U.S. at 469 n.11 (quotation marks and citation omitted); *see also* Fed. R. Civ. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before judgment."). Under these circumstances, litigants should not be permitted to "thrust[] appellate courts indiscriminately into the trial process." *Livesay*, 437 U.S. at 476; *see also Cohen*, 337 U.S. at 546 (federal law "disallow[s] appeal from any decision which is tentative, informal or incomplete").

Allowing plaintiffs to force appellate courts to review orders denying class certification by voluntarily dismissing their cases would license plaintiffs to sidestep Rule 23(f)'s carefully crafted compromise. Indeed, as this case vividly illustrates, the voluntary dismissal tactic would enable plaintiffs to force appellate courts to hear the very appeals they just turned down. This would render the judicial discretion conferred in Rule 23(f) an empty promise.

In sum, named plaintiffs in putative class actions wishing to challenge class certification rulings must use the tool this Court and Congress provided all parties: discretionary review under Rule 23(f). Where, as here, the court of appeals denies permission to appeal, plaintiffs must do the same as what defendants must: litigate their claims on the merits. At the conclusion of that litigation, no matter the outcome, plaintiffs will have a final judgment from which to appeal.

II. Article III's Mootness Doctrine Also Bars Appellate Jurisdiction Under These Circumstances.

Respondents' voluntary dismissal may be deemed final only if it unconditionally terminates their merits claims, precluding them from springing back to life. *See, e.g., Deakins v. Monaghan*, 484 U.S. 193, 200 & n.4 (1988) (dismissal at plaintiffs' request "prevented [them] from reviving their claims"). In that event, however, the case is moot.

1. Article III's "case or controversy" requirement demands plaintiffs maintain a "personal stake" in the litigation, *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990), remaining "adverse" to the defendants "at all stages of review, not merely at the time the complaint is filed," *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)). A case therefore "becomes moot"—and "no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam)). "Mootness has been described as the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Arizonans*, 520 U.S. at 68 n.22 (1997) (internal quotation marks and citation omitted)).

Alternately stated, "Article III denies federal [appellate] courts the power to decide questions that cannot affect the rights of litigants in the case before

them." *Lewis*, 494 U.S. at 477 (internal quotation marks omitted). "No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute 'is no longer embedded in any actual controversy about the plaintiff's particular legal rights.'" *Already*, 133 S. Ct. at 727 (quoting *Alvarez v. Smith*, 558 U.S. 87, 93 (2009)).

In light of these principles, it has long been a "familiar rule that a plaintiff who has voluntarily dismissed his complaint may not [appeal from that dismissal]." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 680-81 (1958); *see also Central Trans. Co. v. Pullman's Palace Car Co.*, 139 U.S. 24, 39 (1891) ("[A] plaintiff, who appears by the record to have voluntarily become nonsuit, cannot sue out a writ of error."); *Kelly v. Great Atl. & Pac. Tea Co.*, 86 F.2d 296, 297 (4th Cir. 1936) ("[I]t is well settled in the federal courts that no appeal lies from a judgment of voluntary nonsuit."). Even when a voluntary dismissal could be said to generate a "final" judgment, it is "entered at the request of plaintiff, and he may not, after causing the order to be entered, complain of it on appeal." *Kelly*, 86 F.2d at 297. The voluntary dismissal order strips the plaintiff of any stake in the lawsuit, making the case moot.

A pair of cases decided two hundred years ago illustrates the sturdiness of this rule. In *United States v. Evans*, 9 U.S. (5 Cranch) 280 (1809), the trial court "rejected certain testimony which was offered by the attorney for the United States." *Id.* at 280. Rather than continue to litigate, the Government "became *nonsuit*"—that is, voluntarily dismissed the case. *Id.* When the Government

sought review of the trial court's evidentiary order, this Court refused to entertain the appeal. *See id.* at 281. Similarly, in *Evans v. Phillips*, 17 U.S. (4 Wheat.) 73, 74 (1817), the plaintiff, "having submitted to a nonsuit in the circuit court," sought to take an appeal. This Court granted the defendant's motion to dismiss "upon the ground, that the plaintiff had submitted to a nonsuit in the court below, upon which no writ of error will lie." *Id.* at 73.

This Court has not had any recent need to apply the rule barring appellate jurisdiction when plaintiffs dismiss their cases, but the courts of appeals continue to enforce it. For instance, in *Druhan v. American Mutual Life*, 166 F.3d 1324 (11th Cir. 1999), the district court denied the plaintiff's motion to remand to state court. The plaintiff then voluntarily dismissed her case with prejudice and appealed to challenge the order denying her request for remand. The Eleventh Circuit held "it is clear that we have no jurisdiction" over the appeal because "the required adverseness is lacking." *Id.* at 1326. "Neither party contends that the district court erred in entering final judgment for the defendant—the plaintiff specifically requested it, and the defendant (understandably) is not complaining." *Id.* Similar cases populate the appellate landscape. *See, e.g.*, *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 99-100 (4th Cir. 2011); *Laczay v. Ross Adhesives*, 855 F.2d 351, 355 (6th Cir. 1988); *Bowers v. St. Louis S.W. Ry. Co.*, 668 F.2d 369, 369-70 (8th Cir. 1981).

2. The Ninth Circuit has pushed aside this straightforward rule. While acknowledging "a final judgment must be adverse to a party in order to be appealable," the court of appeals concluded in the

decision it applied here that a plaintiff's voluntary "dismissal with prejudice does not destroy the adversity in that judgment." *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1064-65 (9th Cir. 2014); *accord* Pet. App. 11a-12a.

The Ninth Circuit is mistaken. The only circumstance in which a plaintiff's voluntary dismissal may preserve adversity is when a prior order effectively decides the plaintiff's claim on the merits—rendering the dismissal nothing more than a formal embodiment of the plaintiff's loss and a ministerial step on the way to an inevitable appeal. In *Procter & Gamble*, for example, the district court ordered the plaintiff in a civil antitrust case (the Government), on pain of dismissal, to produce a grand jury transcript to the defense. 356 U.S. at 679. The Government responded by asking the court to go ahead and dismiss the case. "When the Government proposed dismissal for failure to obey, *it had lost on the merits* and was only seeking an expeditious review." 356 U.S. at 680-81 (emphasis added). In other words, like the plaintiff in an earlier case, the Government "did not consent to a judgment against [it], but only that, if there was to be such a judgment, it should be in final form instead of interlocutory." *Id.* at 681 (quoting *Thomsen v. Cayser*, 243 U.S. 66, 83 (1917)).

In light of this Court's careful explanations in these cases, appellate courts outside the Ninth Circuit recognize that Article III permits an appeal from a voluntary dismissal only when the district court has entered a contested court ruling adverse to the plaintiff that is "case dispositive" "as to the merits of the plaintiff's claims." *OFS Fitel, LLC v.*

Epstein, Becker & Green, P.C., 549 F.3d 1344, 1356-58 (11th Cir. 2008). Even the Sixth Circuit's *Laczay* decision, which the Ninth Circuit claimed supports its holding in *Berger*, 741 F.3d at 1065, stresses that a plaintiff may not appeal after voluntarily dismissing his claims if "it cannot be said with certainty that the plaintiff had finally lost on the merits" once the district court entered the order he wishes to attack, *Laczay*, 855 F.2d at 355. "The basic requirement for appealability of a consent judgment is that the one proposing or soliciting it shall have 'lost on the merits.'" *Id.* (quoting *Procter & Gamble*, 356 U.S. at 681).

That merits prerequisite is not satisfied here. As this Court has explained many times, an order denying class certification "in no way touch[es] the merits of [a plaintiff's] claim but only relate[s] to pretrial procedures." *Gardner v. Westinghouse Broad. Co*, 437 U.S. 478, 482 (1978); *see also id.* at 480-81 (denial of class certification "d[oes] not affect the merits of petitioner's own claim"); *Moses H. Cone Mem. Hosp. v. Mercury Const.*, 460 U.S. 1, 10 n.11 (1983) (denial of class certification has "no *legal* effect on the named plaintiff's ability to proceed with his individual claim"). The named plaintiffs remain entirely "free to "proceed on [their] individual claim[s]." *Livesay*, 437 U.S. at 467. Accordingly, the class certification denial here left the respondents' own claims fully intact. To the extent their voluntary dismissal of those unlitigated claims remains binding regardless of the outcome of the appeal, the dismissal mooted the case, stripping it of the adversity necessary to support an appeal.

3. Respondents have always limited their alleged "personal stake" in this appeal to their own individual claims. BIO 16 n.4. They have never contended a "case or controversy" exists based on any relationship they have to the class they sought to represent. So they have "forfeited" any right to make any argument now predicated on their proposed class representation. *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 397 (2015). At any rate, any such argument would fail as well.

In certain circumstances, plaintiffs seeking to represent classes whose claims are resolved retain standing to appeal class certification denials. Specifically, when named plaintiffs' claims are mooted "without their consent," they retain a personal stake in class certification sufficient to support an appeal from a denial of that request. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980); *Geraghty*, 445 U.S. at 402. In that situation, the class certification issue determines whether the named plaintiffs may recover attorney's fees and costs by "allocating such costs among all members of the class who benefit from the recovery." *Roper*, 445 U.S. at 333, 338 n.9; *see also Geraghty*, 445 U.S. at 401 ("Geraghty's 'personal stake' in the outcome of the litigation is, in a practical sense, no different from that of the putative class representatives in *Roper*."). This Court has also suggested that a named plaintiff who has sought class certification "must be accorded a fair opportunity to show that certification is warranted." *Campbell-Ewald*, 136 S. Ct. at 672. So if events beyond the plaintiff's control preclude that, "an appeal lies from the denial [of class certification] and [a reversal] 'relates back' to the

date of the original denial." *Geraghty*, 445 U.S. at 404 n.11.

This Court has since indicated that some of this reasoning might no longer be valid. *See Symczyk*, 133 S. Ct. at 1532 n.5; *see also Campbell-Ewald*, 136 S. Ct. at 679 n.1 (Roberts, C.J., dissenting). But there is no need to revisit *Roper* or *Geraghty* here. The continuing vitality of those cases has no bearing on the legitimacy of the voluntary dismissal tactic.

Respondents voluntarily dismissed their individual claims without obtaining any relief, so they have no argument for spreading attorney's fees or costs. *See Boeing Co. v. Gemert*, 444 U.S. 472, 478 (1980) (only a "successful litigant" may seek to spread fees or costs). And *Geraghty*'s "relation back doctrine," even in its strongest form, "comes into play only when a court confronts a jurisdictional gap—an individual claim becoming moot before the court can certify a representative action." *Symczyk*, 133 S. Ct. at 1536 (Kagan, J., dissenting). Here, respondents' claims were not mooted against their will or even by happenstance. Respondents were free to litigate their individual claims to conclusion and then, if successful, seek "effective review [of the denial of class certification] after final judgment." *Livesay*, 434 U.S. at 469. But they chose to forego that opportunity, declining to prosecute their claims and asking for entry of judgment against them. Pet. App. 35a-39a. Having done so, respondents no longer have a personal stake in the outcome of this litigation.

Roper and *Geraghty*, in short, are designed to ensure "sound judicial administration" and prevent defendants or the mere passage of time from thwarting potentially meritorious class actions.

Roper, 445 U.S. at 339. But here, it is the *plaintiffs* who are engaged in gamesmanship, inviting piecemeal appeals and triggering the needless expenditure of judicial resources. No policy or rule counsels abandoning traditional mootness principles to enable this appeal.

CONCLUSION

For the foregoing reasons, the Court should reverse and remand with instructions to dismiss the appeal.

Respectfully submitted,

Bradford L. Smith
Horacio E. Gutiérrez
David M. Howard
Timothy G. Fielden
Microsoft Corporation
One Microsoft Way
Redmond, WA 98052

Charles B. Casper
Montgomery, McCracken
Walker & Rhoads, LLP
123 South Broad Street
Philadelphia, PA 19109

Jeffrey L. Fisher
559 Nathan Abbott Way
Stanford, CA 94305

Stephen M. Rummage
Counsel of Record
Fred B. Burnside
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101
(206) 622-3150
steverummage@dwt.com

February 26, 2016

RECORD AND BRIEFS

Supreme Court U.S.
FILED
MAY 16 2016
OFFICE OF THE CLERK

No. 15-457

In the Supreme Court of the United States

MICROSOFT CORPORATION, PETITIONER

v.

SETH BAKER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

BRENDAN S. MAHER
Counsel of Record
DANIEL L. GEYSER
DOUGLAS D. GEYSER
Stris & Maher LLP
6688 N. Central Expy., Ste. 1650
Dallas, TX 75206
(213) 995-6805
brendan.maher@strismaher.com

PETER K. STRIS
RADHA A. PATHAK
DANA BERKOWITZ
VICTOR O'CONNELL
THOMAS E. LOGAN
Stris & Maher LLP
725 S. Figueroa St., Ste. 1830
Los Angeles, CA 90017

DARREN T. KAPLAN
Stueve Siegel Hanson LLP
1359 Broadway, Ste. 2001
New York, NY 10018

MARK A. GRIFFIN
AMY WILLIAMS-DERRY
BENJAMIN GOULD
Keller Rohrback LLP
1201 Third Ave., Ste. 3200
Seattle, WA 98101

Counsel for Respondents

(Additional counsel listed on signature page)

QUESTION PRESENTED

Whether a federal court of appeals has jurisdiction under both 28 U.S.C. 1291 and Article III to review an order denying class certification after the named plaintiffs voluntarily dismiss their individual claims with prejudice.

PARTIES TO THE PROCEEDINGS

Petitioner is Microsoft Corporation.

Respondents are Seth Baker, Matthew Danzig, James Jarrett, Nathan Marlow, and Mark Risk. Those individuals were also named plaintiffs below, along with Jesse Bernstein, who dismissed his appeal and is not a respondent here.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT OF THE CASE 3

A. Statutory Background 3

B. Facts and Procedural History 9

SUMMARY OF ARGUMENT 17

ARGUMENT 22

I. RESPONDENTS' VOLUNTARY DISMISSAL WITH PREJUDICE CREATED A FINAL JUDGMENT UNDER 28 U.S.C. 1291 PERMITTING THE NINTH CIRCUIT TO REVIEW THE ORDER STRIKING CLASS ALLEGATIONS 22

A. This Court Has Long Recognized That All Final Judgments Are Final Decisions For Purposes Of 28 U.S.C. 1291 23

B. Microsoft's Effort To Create An Atextual *Exception* To Section 1291 Is Meritless 26

1. Microsoft demonstrably misreads *Livesay* 27

2. Microsoft also misapprehends Rule 23(f) 31

II. MICROSOFT'S POSITION REGARDING 28 U.S.C. 1291 IS PREDICATED ENTIRELY ON POLICY ARGUMENTS THAT ARE MISGUIDED AND MISDIRECTED 34

A. The Legal System Has Clear, Built-in Protections That Limit Any Abuse Of Voluntary Dismissals With Prejudice 35

B. Microsoft's Position Would Frustrate The Efficient Resolution Of Disputes 38

C. In Any Event, Microsoft's Attempt To "Refine When A District Court Ruling Is 'Final'" Should Be Addressed Through Rulemaking 43

III. THERE WAS NO ARTICLE III OBSTACLE PREVENTING NINTH CIRCUIT REVIEW OF THE ORDER STRIKING CLASS ALLEGATIONS 44

A. Respondents' Individual Claims Were Impaired By The Class Order, And Respondents Expressly Reserved Their Rights To Challenge That Impairment 44

B. Even If The Voluntary Dismissal In This Case Did Moot Respondents' Individual Claims, It Did Not Moot The Lawsuit 50

1. Under *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326 (1980), respondents have an economic interest in class certification that satisfies Article III 52

2. Respondents also have the same noneconomic interest in obtaining class certification that was endorsed by *United States Parole Commission* v. *Geraghty*, 445 U.S. 388 (1980) 55

CONCLUSION 58

TABLE OF AUTHORITIES

Cases — Page(s)

Abney v. *United States*,
431 U.S. 651 (1977) ..... *passim*

Amchem Prods., Inc. v. *Windsor*,
521 U.S. 591 (1997) 47

Canter, Adm'x v. *Am. Ins. Co.*,
28 U.S. (3 Pet.) 307 (1830) 4

Carnegie v. *Household Int'l, Inc.*,
376 F.3d 656 (7th Cir. 2004) 47

Catlin v. *United States*,
324 U.S. 229 (1945) 4, 26

Cent. Transp. Co. v. *Pullman's Palace Car Co.*,
139 U.S. 24 (1891) 53, 54

Chira v. *Lockheed Aircraft Corp.*,
634 F.2d 664 (2d Cir. 1980) 54

Cohen v. *Beneficial Industrial Loan Corp.*,
337 U.S. 541 (1949) 5

Coopers & Lybrand v. *Livesay*,
437 U.S. 463 (1978) ..... *passim*

Costello v. *BeavEx, Inc.*,
810 F.3d 1045 (7th Cir. 2016) 42

Deposit Guar. Nat'l Bank v. *Roper*,
445 U.S. 326 (1980) ..... *passim*

Dig. Equip. Corp. v. *Desktop Direct, Inc.*,
511 U.S. 863 (1994) 5, 37

Downey v. *State Farm Fire & Cas. Co.*,
266 F.3d 675 (7th Cir. 2001) 33, 51

Espenscheid v. *DirectSat USA, LLC*,
688 F.3d 872 (7th Cir. 2012) 60, 61

Evans v. *Phillips*,
17 U.S. (4 Wheat.) 73 (1817) 53

Flores v. *Cabot Corp.*,
604 F.2d 385 (5th Cir. 1979) 43

Forgay v. *Conrad*,
47 U.S. (6 How.) 201 (1848) 5

Gabelli v. *SEC*,
133 S. Ct. 1216 (2013) 57

Gable v. *Land Rover N.A., Inc.*, No. CV07-0376,
2008 WL 4441960 (C.D. Cal. 2008) 15, 16, 18

Gary Plastic Packing Corp. v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*,
903 F.2d 176 (1990) 38

Gillespie v. *U.S. Steel Corp.*,
379 U.S. 148 (1964) 5

Haldeman v. *United States*,
91 U.S. 584 (1875) 54

In re D.C. Water & Sewer Auth.,
561 F.3d 494 (D.C. Cir. 2009) 37

In re Mego Fin. Corp. Sec. Litig.,
213 F.3d 454 (9th Cir. 2000) 61

In re Microsoft Xbox Scratched Disc Litig., No.
C07-1121, 2009 WL 10219350 (W.D. Wash. Oct.
5, 2009) 15, 16, 17

In re Skinner & Eddy Corp.,
265 U.S. 86 (1924) 53

In re Tiffany,
252 U.S. 32 (1920) 4

Kelly v. *Great Atl. & Pac. Tea Co.*,
86 F.2d 296 (4th Cir. 1936) 54, 55

Kotteakos v. *United States*,
328 U.S. 750 (1946) 42

Matusick v. *Erie Cty. Water Auth.*,
757 F.3d 31 (2d Cir. 2014) 42

Mohawk Indus., Inc. v. *Carpenter*,
558 U.S. 100 (2009) 10, 37, 50

Morrison Knudsen Corp. v. *Fireman's Fund Ins. Co.*,
175 F.3d 1221 (10th Cir. 1999) 43

New Hampshire v. *Maine*,
532 U.S. 742 (2001) 34

OFS Fitel, LLC v. *Epstein, Becker, and Green, P.C.*,
549 F.3d 1344 (11th Cir. 2008) 55

Pac. R.R. v. *Ketchum*,
101 U.S. 289 (1879) 27, 33

Pelletz v. *Weyerhaeuser Co.*,
592 F. Supp. 2d 1322 (W.D. Wash. 2009) 61

Richards v. *Delta Air Lines, Inc.*,
453 F.3d 525 (D.C. Cir. 2006) 62

Rudolph v. *Sensener*,
39 App. D.C. 385 (1912) 54

SEC v. *Gabelli*,
653 F.3d 49 (2d. Cir. 2011) 57

Shinseki v. *Sanders*,
556 U.S. 396 (2009) 42

So. Pac. Trans. Co. v. *ICC*,
69 F.3d 583 (D.C. Cir. 1995) 35

Stack v. *Boyle*,
342 U.S. 1 (1951) 2, 50

Swint v. *Chambers Cty. Comm'n*,
514 U.S. 35 (1995) 8, 10, 37, 49

Tollett v. *Henderson*,
411 U.S. 258 (1973) 33

U.S. Parole Comm'n v. *Geraghty*,
445 U.S. 388 (1980) 3, 63, 64

United States v. *Babbitt*,
104 U.S. 767 (1881) 51

United States v. *Evans*,
9 U.S. (5 Cranch) 280 (1809) 53

United States v. *Procter & Gamble*,
356 U.S. 677 (1958) ..... *passim*

Webb v. *ABF Freight Sys., Inc.*,
155 F.3d 1230 (10th Cir. 1998) 35

Wolin v. *Jaguar Land Rover N.A., LLC*,
617 F.3d 1168 (9th Cir. 2010) 16, 17, 18

Statutes Page(s)

9 U.S.C. 16(a)(1)(C) 4

15 U.S.C. 29 26

28 U.S.C. 1291 ..... *passim*

28 U.S.C. 1292(a)(1) 4

28 U.S.C. 1292(a)(2) 4

28 U.S.C. 1292(a)(3) 4

28 U.S.C. 1292(e) 6

28 U.S.C. 2072(c) 6, 44, 45

28 U.S.C. 2111 38

62 Stat. 989 26

Judiciary Act of 1789 § 21 3

Judiciary Act of 1789 § 22 3

Judiciary Act of 1789 § 25 3

Other Authorities **Page(s)**

2015 Federal Court Management Statistics Report, http://www.uscourts.gov/statistics-reports/federal-court-management-statistics-december-2015 37

7B Charles A. Wright et al., Federal Practice & Procedure § 1802 (3d ed. 2005) 9

Appellate Advisory Committee Agenda Books 8, 9

Appellate Advisory Committee Meeting Minutes 7, 8

Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 Yale L.J. 539 (1932) 3

Civil Advisory Committee Meeting Minutes 7

Margaret A. Berger, *When, If Ever, Does Evidentiary Error Constitute Reversible Error*, 25 Loy. L.A. L. Rev. 893 (1992) 39

Note, *Interlocutory Appeal From Orders Striking Class Action Allegations*, 70 Colum. L. Rev. 1292 (1970) 39

Notes of Civil/Appellate Subcommittee Conference Calls 7

Report of the Federal Courts Study Committee (Apr. 2, 1990) 5

Richard A. Posner, *Introduction—Federal Courts Symposium*, 1990 BYU L. Rev. 1 (1990) 5

Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. Pitt. L. Rev. 717 (1993) 6

Thomas E. Willging et al., Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules (Federal Judicial Center 1996) 35

Rules Page(s)

Fed. R. Civ. P. 23(f) ..... *passim*

Fed. R. Crim. P. 11(a)(2) 29

INTRODUCTION

According to Microsoft, the court of appeals lacked jurisdiction to hear an appeal from a final judgment dismissing respondents' claims with prejudice. Microsoft is wrong. Jurisdictional rules, including appellate ones, should be simple and clear. Here, Microsoft challenges the simplest and oldest appellate rule of all: an appeal lies when a case is over. To win that challenge, Microsoft must overcome an extremely heavy burden, which it cannot do.

The relevant facts are straightforward. Respondents brought a putative class action over a design defect in a Microsoft video-game console. The district court erroneously struck respondents' class allegations, and the Ninth Circuit declined to hear a Fed. R. Civ. P. 23(f) appeal. Because the value of respondents' claims was small, litigating those claims individually was economically irrational. Respondents therefore asked the district court to dismiss their lawsuit with prejudice so they could appeal the class order. The district court entered judgment accordingly, and the case was over. On appeal, the Ninth Circuit reversed the order striking the class allegations and remanded the case to be litigated.

Microsoft's principal submission is that the Ninth Circuit lacked jurisdiction because a final judgment obtained through voluntary dismissal is not an appealable "final decision" under 28 U.S.C. 1291. That is false. As this Court has acknowledged for decades, "a final judgment always is a final decision" for purposes of Section 1291. *Abney* v. *United States*, 431 U.S. 651, 658 (1977) (*Abney*) (quoting *Stack* v. *Boyle*, 342 U.S. 1, 12 (1951) (Jackson, J., separate opinion)). And neither

Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978) (*Livesay*) nor Fed. R. Civ. P. 23(f)—both of which address *prejudgment* orders—suggests otherwise.

Microsoft urges this Court to craft an atextual exception to Section 1291. According to Microsoft, treating a final judgment obtained through voluntary dismissal as a "final decision" will undermine Section 1291's goals. Not so. In light of the serious costs and risks of this "tactic," few plaintiffs will stake their entire case on anything short of critical issues, and adverse class-certification rulings fit comfortably within that category. Unlike Microsoft's approach, this process will produce an efficient and fair use of judicial and litigant resources. If an adverse ruling is affirmed, the litigation is done forever. If reversed, the parties can litigate with the appropriate level of attention and resources. Unlike Microsoft's rule, it does not force plaintiffs into a Hobson's choice of litigating a tiny claim to verdict at great cost or giving up the right to appeal.

Microsoft's secondary argument is that the Ninth Circuit lacked jurisdiction because the voluntary dismissal rendered this case moot. Microsoft is incorrect.

First, Microsoft's true objection is grounded in waiver principles, not jurisdictional ones. It is plain that this adverse judgment gives rise to a cognizable Article III controversy; the only question is whether respondents waived their claims, and they plainly did not. Indeed, respondents did the *opposite* of waiver by expressly reserving their rights to pursue the entirety of their claims on appeal.

Second, Microsoft cites a line of cases from the 1800s for the proposition that no appeal lies from a judgment of

voluntary nonsuit. But Microsoft's position has a fatal problem: in the 1800s, such nonsuits were entered *without* prejudice—meaning the same lawsuit could always be raised in the same court without any harm to the plaintiff's protected interests. That factor drove those decisions, and Microsoft cannot apply that narrow principle in this very different context.

Finally, even were Microsoft right that respondents' individual claims are extinguished, respondents could still invoke appellate jurisdiction. This Court's decisions in *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326 (1980) (*Roper*) and *United States Parole Commission* v. *Geraghty*, 445 U.S. 388 (1980) (*Geraghty*) make clear that Article III presents no barrier to appealing the adverse-certification ruling itself.

Affirmance is warranted.

STATEMENT OF THE CASE

A. Statutory Background

1. The final judgment rule is currently embodied in 28 U.S.C. 1291. Borrowed from English common law, it has been part of our system since the federal courts were created by Congress. See Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 Yale L.J. 539 (1932). The rule originally provided that an appeal could be taken only from a "final judgment or decree." Judiciary Act of 1789 § 25; see also *id.* §§ 21, 22. Later, that language was changed slightly (the rule now reads "final decisions"), but its meaning remains the same. See *In re Tiffany*, 252 U.S. 32, 36 (1920). A decision is "final" if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U.S. 229, 233 (1945) (citation omitted).

The final judgment rule has been justified as a means to prevent disruptive appeals. See, *e.g.*, *Canter, Adm'x* v. *Am. Ins. Co.*, 28 U.S. (3 Pet.) 307, 318 (1830) (rule prevents "great delays[] and oppressive expenses"). But it may cause injustice if strictly applied in certain pre-judgment circumstances. That reality has led to the creation of statutory exceptions.[1] And it has heavily influenced this Court's interpretation of 28 U.S.C. 1291.[2]

The most significant judicial gloss on the phrase "final decisions" (as applied to pre-judgment orders) is the collateral order doctrine established by this Court in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The doctrine allows "a narrow class of decisions that do not terminate the litigation" to "nonetheless be treated as 'final'" for purposes of 28 U.S.C. 1291, if they satisfy a three-part test. *Dig. Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994).[3] The proper application of the collateral order doctrine has confounded lower courts necessitating this Court's repeated intervention over the past half century.

---

[1] See, *e.g.*, 28 U.S.C. 1292(a)(1) (injunctive relief); 28 U.S.C. 1292(a)(2) (appointing a receiver); 28 U.S.C. 1292(a)(3) (rights and liabilities of parties to admiralty cases); 9 U.S.C. 16(a)(1)(C) (application to compel arbitration).

[2] See, *e.g.*, *Forgay* v. *Conrad*, 47 U.S. (6 How.) 201 (1848); *Gillespie* v. *U.S. Steel Corp.*, 379 U.S. 148 (1964).

[3] A pre-judgment order satisfies that test if it (1) "conclusively determine[s] the disputed question," (2) "resolve[s] an important issue completely separate from the merits of the action," and (3) is "effectively unreviewable * * * [after] final judgment." *Livesay*, 437 U.S. at 468 (1978).

2. In 1990, the Federal Courts Study Committee[4] expressed concerns that the collateral order doctrine had resulted in the frequent and undesirable exercise of *ad hoc* judicial policymaking. Report of the Federal Courts Study Committee 95 (Apr. 2, 1990).[5]

As such, the Committee "propose[d] that Congress consider permitting the rulemaking process to refine and supplement definitions of appellate jurisdiction under the Rules Enabling Act, 28 U.S.C. § 2072." *Ibid.* According to the Committee's report:

> The rulemaking authority under this proposal would include authority both to change * * * decisional results under the finality rule of 28 U.S.C. § 1291 and to add to—but not subtract from—the list of categories of interlocutory appeal permitted by Congress in 28 U.S.C. § 1292.

Id. at 96.

Congress agreed.[6] In 1990, it passed 28 U.S.C. 2072(c) (authorizing the rulemaking process to "define

---

[4] The Study Committee was comprised of prominent jurists such as Judge Richard Posner and tasked with studying the problems of the federal courts. See Richard A. Posner, *Introduction—Federal Courts Symposium*, 1990 BYU L. Rev. 1 (1990).

[5] Specifically, the Committee noted that "[d]ecisional doctrines—such as 'practical finality' and especially the 'collateral order' rule—blur the edges of the finality principle, require repeated attention from the Supreme Court, and may in some circumstances restrict too sharply the opportunity for interlocutory review." *Ibid.*

[6] See generally Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. Pitt. L. Rev. 717 (1993). As Professor Martineau explains:

when a ruling of a district court is final for the purposes of appeal under section 1291 of this title."). And in 1992, it passed 28 U.S.C. 1292(e) (authorizing the rulemaking process to "provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for [in 28 U.S.C. 1292].").[7]

3. To date, rulemakers have considered using—but have not yet employed—the authority conferred by 28 U.S.C. 2072(c) to propose rules changing the definition of finality in 28 U.S.C. 1291.[8] The most notable example involves the subject of "manufactured finality" in multi-claim litigation.

> In 1990 and 1992 Congress enacted two acts, each implementing some of the recommendations the Federal Courts Study Committee ("FCS Committee") made in its report dated April 2, 1990 [which] allow changes in the final judgment rule as contained in sections 1291 and 1292 of title 28 of the U.S. Code.

Id. at 718.

[7] This Court has expressed a preference for using the rulemaking process to define or refine when a district court ruling is "final" under 28 U.S.C. 1291 and to determine that a type of interlocutory order should be appealable under 28 U.S.C. 1292. See, *e.g.*, *Swint* v. *Chambers Cty. Comm'n*, 514 U.S. 35, 48 (1995) (*Swint*) ("Congress' designation of the rulemaking process as the way to define or refine when a district court ruling is 'final' and when an interlocutory order is appealable warrants the Judiciary's full respect.").

[8] On the other hand, rulemakers have (albeit only once) used the authority conferred by 28 U.S.C. 1292(e) to enact a rule that would authorize the appeal of an interlocutory decision not otherwise available under Section 1292. That rule is Fed. R. Civ. P. 23(f) which authorizes an appellate court to "permit an appeal from an order granting or denying class-action certification."

In the multi-claim context, "[t]he 'manufactured finality' doctrine * * * concerns situations in which the district court dismisses with prejudice fewer than all the plaintiff's claims and the plaintiff then voluntarily dismisses the remaining claims in order to obtain an appealable judgment." Minutes of November 2008 Appellate Advisory Committee Meeting at 18.[9] Noting that "[t]he circuits take varying approaches to this doctrine," *id.* at 19, three different rules subcommittees proceeded to study and discuss the manufactured finality doctrine with frequency for several years.[10]

---

[9] Available at http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-appellate-procedure-november-2008.

[10] This topic was discussed at seven different meetings of the Appellate Advisory Committee, see Meeting Minutes for November 2008 at 18-20, April 2009 at 17-18, October 2010 at 10-12, April 2011 at 12-14, September 2012 at 12-13, April 2013 at 16-17, and April 2015 at 32-33, available at http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/meeting-minutes, four different meetings of the Civil Advisory Committee, see Meeting Minutes for November 2010 at 53-55, April 2011 at 39-40, November 2011 at 32-33, and April 2015 at 21-25, available at http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/meeting-minutes, and four different conference calls of the Civil/Appellate Subcommittee, see Agenda Books for November 2010 at 597-601 and April 2015 at 431-445, available at http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/agenda-books. The issue also prompted six detailed memoranda prepared by the Reporter of the Appellate Advisory Committee. See Agenda Books for November 2008 at 197-221, April 2009 at 280-294, September 2012 at 251-257, April 2013 at 359-368, April 2015 at 945, and October 2015 at 87, available at http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/agenda-books.

So far, the rulemakers have made the considered decision not to propose any rules addressing multi-claim manufactured finality. See, *e.g.*, Minutes of April 2015 Appellate Advisory Committee Meeting at 32-33.[11] Nonetheless,

> [t]he chair [of the Appellate Advisory Committee] noted, however, that if the division in authority warrants a uniform national rule, the rulemakers have an important role to play in making policy decisions about finality—as the Supreme Court made clear in *Mohawk* * * * and *Swint* * * * .

Id. at 33.

Unlike the question of "manufactured finality" in a multi-claim context, the question of "manufactured finality" in the class certification setting has not yet been presented by any stakeholder for thorough study by the rulemakers. But the issue is beginning to organically attract attention; in 2013, an Appellate Advisory Committee memorandum motivated by the "Supreme Court's observation in *Mohawk* * * * and *Swint*" about the importance of the rulemaking process in construing 28 U.S.C. 1291 took note of circumstances like this one, and went on to describe "[o]rders denying class status if the putative class member is willing to waive his or her individual claims" as "effectively creating a final

---

[11] Available at http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-appellate-procedure-april-2015.

judgment." See October 2013 Appellate Advisory Committee Agenda Book Supplement at 7-21.[12]

That is hardly surprising. As a leading treatise, for which a longstanding member of the Committee on Rules of Practice and Procedure[13] is an author, notes:

> The sixth method of obtaining review following a court order eliminating the class-action allegations is tactically risky. If the district court strikes the class-action designation with leave to amend so that the action may proceed on an individual basis, the party seeking class treatment may refuse to do so and allow the court to enter a final judgment dismissing the complaint with prejudice. An appeal then can be taken since the adjudication is final and falls within Section 1291. However, this procedure is a dangerous one. If the district court's order is sustained on appeal, plaintiff may be deemed to have forfeited the right to present the merits of the claims by insisting on a review of the class-action question.

7B Charles A. Wright et al., Federal Practice & Procedure § 1802 (footnotes omitted).

B. Facts and Procedural History

1. Microsoft introduced the Xbox 360 in 2005. J.A. 11. Over the next decade, it sold more than 25

---

[12] Available at http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-appellate-procedure-october-2013.

[13] This committee (also known as the standing committee) reviews the recommendations of the five advisory committees and makes recommendations to the Judicial Conference. 28 U.S.C. 2073(b).

million Xbox 360 consoles in the United States alone and more than 50 million worldwide. J.A. 35. The retail price of the console ranged from $149 to $479.99 depending on the configuration. *Ibid.*

The Xbox 360 uses an optical disc drive to play game discs. *Ibid.* Game discs are licensed by Microsoft and priced between $30 and $60 each. *Ibid.* The Xbox 360's disc drive can also play a range of other optical media, including DVDs and audio CDs. *Ibid.*

Microsoft undertook a massive marketing campaign to promote the Xbox 360. Sales literature showed the console sitting on the floor or on an ordinary shelf. J.A. 35-36. Television commercials depicted users engaging in spirited movements as they enthusiastically played games simulating, among other activities, athletic competition (*e.g.*, "2010 FIFA World Cup South Africa"), infantry warfare (*e.g.*, "Call of Duty"), or live rock music performance (*e.g.*, "Guitar Hero"). J.A. 36. And when Microsoft later launched the "Kinect," a device that allows users to control games through their own movements, it encouraged users to "[s]imply jump in." *Ibid.*

The Xbox 360 appealed to gamers in large part due to the speed at which its disc drive spins game discs. J.A. 11. Faster spinning produces smoother graphics and enhances the overall gaming experience, and the Xbox 360's drive could spin discs at roughly twice the speed of its chief competitors. *Ibid.* For instance, the Nintendo Wii and Sony PlayStation III spin discs at 3000 to 4000 rotations per minute, compared to 7500 rotations per minute for the Xbox 360. *Ibid.*

The Xbox 360's greater spin speed came at a cost, however. The high-speed rotation—combined with even small, unintentional movements well within normal use—can sometimes generate gyroscopic pressure that causes a disc to decouple from the spindle that rotates it and crash against the drive's interior parts. J.A. 36.[14] This collision creates distinctive circular grooves that can render the disc permanently unusable by preventing the drive from reading the disc's data. *Ibid.*

Microsoft was well aware of a risk of decoupling. Indeed, before it even launched the Xbox 360, its engineers had discovered the problem (although they hypothesized that the decoupling occurred only when users tilted the console during game play). J.A. 12, 85.

Several fixes were possible. For example, Microsoft could have increased the magnetic force of the disc holder, slowed the rotation speed of the disc drive, or placed small soft patches inside the machine where the discs were likely to contact the machine parts. J.A. 13. Instead, Microsoft simply placed a sticker across the disc-tray mechanism that read, "Do not move console with disc in tray." J.A. 12. The Xbox 360 manual also urges users to "remove discs before moving the console or tilting it between the horizontal and vertical positions." J.A. 12, 85.

Unsurprisingly in light of the nature of the defect, shortly after launching the Xbox 360, Microsoft began to

---

[14] Respondents believe that the fundamental problem was the machine's obsolete tray-loading design. Chief competitors Nintendo Wii and Sony PlayStation III both use a slot-loading drive instead, and their disc holders apply greater force to game discs. J.A. 13

receive complaints that the console scratched game discs during normal use. J.A. 12. According to many owners, the console scratched discs when subject even to the smallest of movements, including vibrations and other indirect forces that occur in an ordinary household environment. J.A. 37. As of April 30, 2008, Microsoft's customer-service department had received approximately 55,000 complaints about scratched discs. J.A. 11. And that number likely understates the true scope of the problem. Some customers who experience scratching may complain to their retailer instead of the manufacturer, and others may decline to complain to anyone, deterred by the warning sticker, Microsoft's refusal to admit any fault, and the time and effort required.

Such widespread scratching problems have not occurred with other consumer products that use optical disc drives, including portable CD and DVD players, notebook computers, and camcorders—despite these devices being subject to regular tilting and movement while operating. J.A. 36-37. That is because, unlike Microsoft, those industry engineers implemented simple, inexpensive, and obvious measures to protect discs while spinning. J.A. 37.

In the face of these complaints, Microsoft has publicly denied any defect with the console design. J.A. 38. It instead blames its customers for misusing the Xbox 360 by deliberately moving the console during play. J.A. 12, 38. Nevertheless, in 2007 Microsoft began a "disc replacement program." Although the cost of pressing and shipping a replacement disc is substantially less than a dollar, the program charged a $20 fee to replace damaged discs. J.A. 38-40.

Microsoft has steadfastly refused to recall the Xbox 360 or compensate users whose game discs were damaged by the faulty disc-drive design. J.A. 38.

2. Respondents are not the first individuals to bring a putative class action against Microsoft based on the Xbox 360's disc-drive defect. In 2007, several suits with similar allegations were consolidated in the Western District of Washington. See Pet. App. 6a; *In re Microsoft Xbox Scratched Disc Litig.*, No. C07-1121, 2009 WL 10219350 (W.D. Wash. Oct. 5, 2009) (J.A. 10-24). The district court there denied class certification, deciding that the class claims foundered on Rule 23(b)(3)'s predominance requirement.

That conclusion rested heavily on the analysis of a California district-court decision rejecting class treatment in a case alleging defects in the Land Rover vehicle's tire-alignment mechanism. J.A. 21-24 (citing *Gable* v. *Land Rover N.A., Inc.*, No. CV07-0376, 2008 WL 4441960 (C.D. Cal. 2008) (*Gable*)). In *Gable* the plaintiffs claimed that a manufacturing defect in all Land Rovers caused the tires in some Land Rovers to wear out unevenly, prematurely requiring those car owners to purchase new tires. J.A. 21. The district court ruled that individual questions regarding damages predominated because some owners would never suffer the effects of the alleged defect. *Ibid.* Individual issues of causation likewise predominated because any given tire might wear out for a host of reasons aside from the alleged alignment defect. J.A. 21-22.

The Scratched Disc Litigation court found *Gable*'s reasoning persuasive. Comparing the Xbox 360 console to the Land Rover vehicle, and comparing the game

discs to the tires, the court concluded that the Xbox defect had not manifested itself in all consoles, and that some scratches that had occurred may have been caused by a user's misuse rather than the defect. J.A. 22-23. Individual issues of damages and causation thus predominated over common ones, and class treatment was inappropriate. J.A. 24. The Scratched Disc Litigation plaintiffs later settled their individual claims and the consolidated cases were dismissed.

Shortly thereafter, however, the Ninth Circuit rejected the California district court's certification analysis in the Land Rover case. See *Wolin* v. *Jaguar Land Rover N.A., LLC*, 617 F.3d 1168 (9th Cir. 2010) (*Wolin*). The court of appeals held that "proof of the manifestation of a defect is not a prerequisite to class certification." *Id.* at 1173. Although factors apart from the alleged alignment defect might "affect premature tire wear, they d[id] not affect whether" the alignment defect existed or whether the defect violated consumer-protection laws. *Ibid.* Therefore, because the alleged defect would exist in every class member's vehicle, class treatment was proper.

3. Prompted by the intervening decision in *Wolin*, Respondents filed the present action. On behalf of themselves and other Xbox 360 owners, they allege that every Xbox 360 disc drive is defectively designed in a way that can permanently damage game discs even during normal, everyday usage. J.A. 27, 35-40. That defect breached Microsoft's warranties and violated various state and federal consumer-protection laws.

Before answering the complaint—and before Respondents could conduct any discovery—Microsoft

moved to strike the class allegations, and the district court granted the motion. J.A. 88-99. The court determined that principles of comity required it to defer to the denial of class certification in the Scratched Disc Litigation, and further concluded that *Wolin* did not undermine that analysis. J.A. 93-99. Respondents sought permission to appeal under Rule 23(f), J.A. 100-120, which the Ninth Circuit denied, J.A. 121.

Unable to proceed with their class claims, Respondents made a risky choice. To secure a final decision that would lead to appellate review of the certification order, they moved to dismiss their action with prejudice, noting their intent to appeal the order striking the class allegations. J.A. 122-124. The motion was granted "[b]ased on" a seven-paragraph stipulation between the parties. Pet. App. 39a. The stipulation provided that it was "not filed pursuant to a settlement agreement" and that dismissal would be with prejudice. Pet. App. 36a.

The stipulation also reiterated Respondents' intent "'to appeal the Court's March 27, 2012 order (Dkt. 32) striking Plaintiffs' class allegations.'" Pet. App. 39a (quoting J.A. 122-123). Nothing in the stipulation waived Respondents' rights to pursue their individual claims or to pursue relief solely on behalf of the class, should the certification decision be reversed. To that end, the parties expressly "reserv[ed]" all "their arguments as to the propriety of any appeal." Pet. App. 36a-37a.

4. On appeal, the Ninth Circuit concluded that it had jurisdiction and that the district court abused its discretion in striking the class allegations. Pet. App. 19a. As to appellate jurisdiction, Microsoft argued "that a

voluntary dismissal with prejudice does not sufficiently affect the merits of the substantive claims to constitute an appealable final judgment." Pet. App. 11a.

The court of appeals disagreed. Because Respondents and Microsoft had entered into a stipulation that explicitly disclaimed any settlement, the Ninth Circuit held that the voluntary dismissal with prejudice was "'a sufficiently adverse—and thus appealable—final decision'" under 28 U.S.C. 1291. Pet. App. 12a.

Turning to the merits of the certification inquiry, the Ninth Circuit concluded that *Wolin* "expressly and specifically rejected" the foundation of *Gable*—and thus the foundation of the order under review here—namely, "that individual manifestations of the defect precluded resolution of the claims on a class-wide basis." Pet. App. 14a. The court of appeals emphasized that Respondents' "position is that the design defect itself breaches the express warranty." Pet. App. 16a. "[I]ndividual factors may affect the timing and extent of the disc scratching," but they do not pertain to whether the Xbox 360 console is itself defective or whether that defect breached any warranty. Pet. App. 15a-16a. The district court's order thus was an abuse of discretion. Pet. App. 19a. The Ninth Circuit did not decide, however, whether Respondents' class allegations ultimately are appropriate for class treatment, instead remanding for further proceedings. *Ibid.*

5. This Court granted certiorari to address the court of appeals' jurisdiction. 136 S. Ct. 890 (2016).

SUMMARY OF ARGUMENT

I. Microsoft insists that the case-closing judgment in this case is not a "final decision" under 28 U.S.C. 1291. Microsoft is wrong. The settled rule for decades is that "a final judgment *always* is a final decision." *Abney* v. *United States*, 431 U.S. 651, 658 (1977) (emphasis added). It makes no difference *why* the judgment was entered; a dismissal with prejudice resolves all pending matters in district court, leaving nothing else to do. The court simply enters judgment "*and close[s] th[e] case.*" Pet. App. 39a (emphasis added).

Microsoft cannot square its position with Section 1291's plain meaning, so it seeks an *exception* to its unambiguous scope. It offers three arguments, but all three fail.

A. Microsoft asserts that "finality" has long received "a practical rather than a technical construction." Pet. Br. 19 (internal quotation marks omitted). True enough in some settings, but not here. A *technical* final judgment is also a *practical* final judgment. The Court has relaxed finality in the collateral order context, where pre-judgment orders in *open* cases may still satisfy Section 1291. But cases construing the outer boundary of "finality" have never justified cutting off final decisions at its core. There is no doubt (under *any* construction) that an actual final judgment qualifies (unremarkably) as a "final decision." *Abney*, 431 U.S. at 658.

B. Microsoft argues that respondents' voluntary dismissal with prejudice "flouts" or "contravenes" this Court's decision in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978). But *Livesay*'s holding starts and stops with *interlocutory* appeals. It addressed whether

indisputably nonfinal orders might nonetheless fall within Section's 1291's reach. It rejected the death-knell doctrine because it was unworkable and unprincipled, due to defects inherent in *its interlocutory setting*. The Court nowhere hinted that a truly final judgment (volunteered or otherwise) would fail to give rise to an ordinary appeal under Section 1291.

C. Microsoft contends that respondents also seek an improper end-run around Fed. R. Civ. P. 23(f). According to Microsoft, if respondents wish to seek review of the district court's certification ruling, they can only seek an interlocutory appeal under Rule 23(f) or review on final judgment *after* litigating their individual claims (for a few hundred dollars) through a full trial. This misses the point entirely. Rule 23(f) exists to allow *interlocutory* appeals; respondents did not obtain an interlocutory appeal—they were stuck seeking review after *final judgment*. That is not an "end run." Respondents had to stake their entire case on the outcome of an appeal, rather than retaining the right to litigate individually after pursuing interlocutory relief. Rule 23(f) is designed in part to *avoid* putting parties to that difficult decision. The fact that respondents had to resort to an inferior alternative hardly means they are undermining the spirit (much less the text) of Rule 23(f).

II. Microsoft ultimately views this case as a question of policy, but its policy arguments are misguided.

A. Microsoft insists that permitting appeals from voluntary dismissals will upend the system and produce a steady flow of time-consuming, wasteful, inefficient appeals. But Microsoft simply neglects to appreciate the clear protections built into the system that limit any

abuse. A dismissal with prejudice forces a party to hinge *everything* on the outcome of the appeal. Few parties with legitimate claims will risk their entire case on an issue unless it is truly devastating to their lawsuit. Rational self-interest alone will reduce substantially the subset of plaintiffs interested in voluntary dismissals.

This strategy also comes with considerable costs as a deterrent. Plaintiffs will be forced to accept a significant burden in expense and delay in pausing litigation to take up an issue on appeal. Unlike interlocutory appeals, there is no prospect of litigating on two tracks; a final judgment ends all litigation in the district court, forcing the plaintiff to wait for the duration of the appeal before having his day in court. In light of the average run time for appeals, this cost is real.

Microsoft also overlooks the impact of harmless-error doctrine. It is well settled that appellate courts will not grant relief unless an error affects a party's "substantial rights." 28 U.S.C. 2111. While Microsoft focuses intently on trivial issues ("discovery orders," "evidentiary rulings," Pet. Br. 21), it is barely plausible that the vast majority of such minor issues would qualify for appellate relief. Rational lawyers do not voluntary dismiss to take frivolous appeals—they do so to challenge mission-critical rulings that make the game worth the candle. Those are precisely the kinds of issues that warrant appellate attention.

B. Microsoft's theory would also harm good-faith litigants and frustrate systemic objectives. Microsoft insists that parties must choose between Rule 23(f) interlocutory appeals or full-blown litigation over tiny claims. It is cold comfort to instruct a litigant with a $30

claim that he can always appeal a class-determination after litigating a complex lawsuit for years. Microsoft does not truly believe that many parties will endure those costs—all to see if they can overcome two major hurdles: (i) prevailing at trial; and (ii) prevailing again in reversing the class-certification ruling on appeal. And this underscores the obvious reality of Microsoft's position: parties with legitimate claims who (as a class) have suffered significant aggregate harm will simply throw in the towel and walk away. No one thinks Section 1291 was designed to immunize legal violations from review.

While few litigants will undertake extensive litigation over minor claims, even that alternative is costly to the system. Parties on both sides will ultimately devote excessive resources to litigating cases on the *chance* that a case may end up as a certified class. Certain individual trials will have to be relitigated as a class trial, twice burdening the system with the same claims.

The alternative is far superior: an appeal from a voluntary dismissal will give adequate notice to all sides of the true scope of the controversy. If the prior order is upheld on appeal, the case is forever dismissed—and the system will avoid the needless waste of an exhaustive trial over individual claims. And if the order is reversed, both sides will be able to calibrate their efforts to the true amount at stake. In the end, there are few scenarios where Microsoft's theory would actually spare any expense, rather than impose distinct and unfair societal costs.

C. In any event, if Microsoft believes that the jurisdictional rules should be amended, its appropriate

audience is Congress or the Rules Advisory Committee. It is wrong to carveout an extra-statutory exception from the plain sweep of Section 1291.

III. There is Article III jurisdiction for the courts to review respondents' claims, and Microsoft's contrary position is baseless.

A. Microsoft first insists that the case is moot, but Microsoft is wrong. This is ultimately a *waiver* issue, not a *jurisdictional* one, and it is obvious that nothing was waived here; indeed, respondents explicitly reserved their rights to challenge the class order and advance their individual claims on any remand.

In asserting that a voluntary dismissal moots any future appeal, Microsoft misreads this Court's decisions. Without realizing it, Microsoft has relied extensively on a series of cases that involved voluntary non-suits *without prejudice*. A dismissal without prejudice implicates different Article III interests than a final judgment forever barring a litigant's claims. Had Microsoft applied the *correct* line of decisions, it would have recognized that the adverse class-certification ruling preserved the full panoply of Article III interests necessary to raise all issues on appeal.

B. Even if respondents' individual claims were somehow mooted, there is still Article III jurisdiction to adjudicate the class-certification issues on appeal. Under this Court's cases, respondents have two protected interests in reversing the prior ruling: a personal economic stake and a noneconomic procedural interest. These class-based rights are related but distinct from respondents' individual claims, and they survive even if respondents' individual claims somehow do not.

ARGUMENT

I. RESPONDENTS' VOLUNTARY DISMISSAL WITH PREJUDICE CREATED A FINAL JUDGMENT UNDER 28 U.S.C. 1291 PERMITTING THE NINTH CIRCUIT TO REVIEW THE ORDER STRIKING CLASS ALLEGATIONS

Throughout this litigation, Microsoft has chiefly resisted appellate review by saying that a final judgment was not "final" under 28 U.S.C. 1291. See, *e.g.*, Pet. Br. 16-33. That position is baseless. The plain statutory text forecloses Microsoft's argument, and Microsoft's attempt to seek an *exception* to Section 1291's command falls short. Microsoft ultimately relies on authorities restricted to *interlocutory* orders, not final judgments. That is a distinction *with* a difference: parties may not have an absolute right to take interlocutory appeals from class-certification rulings, but that says nothing about their right to obtain review on final judgment.

Microsoft assuredly knows the upshot of its position: looking to the real world, it is simply not true that most parties with small-value claims will absorb tremendous costs and litigate to finality. And, indeed, while refusing to admit it, that assuredly is not the result Microsoft itself actually wants. Litigation is expensive and it taxes the limited resources of the parties and the courts. No one benefits from extensive, complex trials over $30 claims. What Microsoft really wants—and the result it actually envisions—is a world in which injured parties cannot seek judicial review at all. Microsoft's position is unsupportable as a matter of law and incoherent as a matter of policy. It should be rejected.

A. This Court Has Long Recognized That All Final Judgments Are Final Decisions For Purposes Of 28 U.S.C. 1291

1. The final judgment rule of 28 U.S.C. 1291 vests appellate courts with jurisdiction to review "all final decisions" of the district courts. 28 U.S.C. 1291. For over 70 years now, this Court has understood that language to mean what it plainly says. A "final" decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U.S. 229, 233 (1945).

The Stipulation and Order at issue here (Pet. App. 35a-39a) fall easily within this definition. This is the Order in its entirety:

> Based on the foregoing Stipulation, the Court GRANTS Plaintiffs' Motion to Dismiss with Prejudice, with all parties to bear their own costs and fees. *The Court hereby directs the Clerk to enter Judgment accordingly and close this case.*

Pet. App. 39a (emphasis added). It dismisses the matter "with Prejudice" and "close[s] the case." It leaves nothing to do but execute the judgment. The decision is final for purposes of Section 1291.

2. Microsoft, however, disagrees. It says that the case may be *technically* final but it is not *practically* final, all because respondents' claims were voluntarily dismissed and could be revived with a successful appeal. Pet. Br. 18.

Microsoft is confused. It is always the case that an otherwise "final" judgment may be unwound by a successful appeal; if the prospect of additional work on

remand eliminated finality, appellate jurisdiction would be limited to cases with no prejudicial error. The relevant question is not *how* a judgment became final, but whether it *is* final. See, *e.g.*, *Pac. R.R.* v. *Ketchum*, 101 U.S. 289, 295 (1879). And this case is unequivocally final in its present form: by voluntarily dismissing their claims with prejudice, respondents eliminated any further work at the district-court level.

In seeking to avoid this finality, Microsoft insists that the Court may contract Section 1291, just as it expanded Section 1291 for certain collateral orders. Pet. Br. 19. But this reasoning is upside down. There is no basis for contracting anything. The "substance" of respondents' appeal (*ibid.*) is not "interlocutory" in any legal or practical sense; it seeks to overturn an adverse final judgment that dismisses their claims *with prejudice*. While "there are instances in which a final decision is not a final judgment," a "final judgment always is a final decision." *Abney*, 431 U.S. at 658. This Court has never relied on "practical" considerations to find that a case-closing judgment somehow fails to satisfy Section 1291.

Indeed, in direct contravention of the position advanced by Microsoft and its amici, this Court has expressly held that a plaintiff may consent to the entry of final judgment in order to appeal a prior adverse ruling that would otherwise be interlocutory. *United States v. Procter & Gamble*, 356 U.S. 677, 680-681 (1958) (*Procter & Gamble*).

In *Procter & Gamble*, the United States—following a federal grand jury investigation of possible criminal antitrust violations where no indictment was returned—filed a civil antitrust case against the company. *Id.* at

678. The United States was using the grand jury transcript to prepare the civil case for trial, and Procter & Gamble moved for production of the transcript. *Ibid.* The district court granted the motion and "entered [interlocutory] orders directing the Government to produce the transcript in 30 days." *Id.* at 679.

"The Government, adamant in its refusal to obey, filed a motion in the District Court requesting that those orders be amended to provide that, if production were not made, the court would dismiss the complaint." *Ibid.* The District Court amended the interlocutory orders and, when the United States persisted in refusing to obey, it "entered judgment of dismissal." *Id.* at 680.

In this Court, Procter & Gamble argued "that th[e] appeal may not be maintained, because dismissal of the complaint was solicited by the Government." *Ibid.* This Court rejected every basis for Procter & Gamble's jurisdictional argument, including the possible absence of statutory finality. See *Procter & Gamble*, 356 U.S. at 680 ("The orders of dismissal were final orders, ending the case.").[15]

---

[15] As this Court noted, "the case is here by way of appeal, 32 Stat. 823, as amended, 62 Stat. 869, 989, 15 U.S.C. § 29". *Procter & Gamble*, 356 U.S. at 680. That statute (15 U.S.C. 29), which applies to certain lawsuits filed by the United States, has always employed the same definition of finality as 28 U.S.C. 1291. Today, it provides that "any appeal from a final judgment entered in any such [previously described] action shall be taken to the court of appeals pursuant to sections 1291 and 2107 of title 28." 15 U.S.C. 29. At the time of *Procter & Gamble*, it provided that "In any civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the

Conveniently, Microsoft only discusses *Procter & Gamble* in connection with arguments about Article III. Pet. Br. 15, 35, and 37. But, if there were any doubt, the holding of *Procter & Gamble* expressly forecloses Microsoft's "interpretation" of 28 U.S.C. 1291.

B. Microsoft's Effort To Create An Atextual *Exception* To Section 1291 Is Meritless

The judgment in this case is unequivocally "final" in every conceivable sense of Section 1291. But Microsoft ignores Section 1291's plain text, and seeks an *exception* to its unambiguous command. Courts do not lightly ignore the plain language of jurisdictional statutes. There is not a single case from this Court suggesting that an indisputably final decision—one where the entirety of the action in district court is over—is somehow not "final" for purposes of Section 1291.

In seeking a departure from this settled law, Microsoft insists that respondents are flouting the Court's decision in *Livesay* and thwarting Rule 23(f)'s review process. Yet both sources address *interlocutory* orders, not final judgments; they are driven by concerns inherent with interlocutory rulings. Respondents have simply asked the Court to follow the plain text of a jurisdictional statute. Microsoft does not wish to enforce the plain text; it wants an *exception*. And it misreads the two main sources—*Livesay* and Rule 23(f)—that it invokes as support for its atextual carveout. Microsoft's theory is wrong and should be rejected.

---

final judgment of the district court will lie only to the Supreme Court." 62 Stat. 989.

1. Microsoft demonstrably misreads Livesay

As its lead argument, Microsoft argues that respondents' "voluntary dismissal tactic" somehow "contravenes" *Livesay* and "resuscitates the death-knell doctrine." Pet. Br. 13, 16. This is demonstrably false.

a. *Livesay* had nothing to do with final judgments; it involved a pre-judgment order that was *actually interlocutory*. See 437 U.S. at 469. It asked whether Section 1291 permitted an *exception* for indisputably nonfinal orders that "likely" sounded the death-knell of an action. *Ibid.*

While the Court rejected the "death-knell" doctrine, it did so for reasons having nothing to do with the situation here. In applying the doctrine, lower courts adopted "two quite different methods of identifying an appealable class ruling." *Livesay*, 437 U.S. at 472-473. The first allowed an appeal if the case met an "arbitrarily selected jurisdictional amount"—a method that invaded the "legislative * * * function" and wrongly departed from Section 1291's statutory "test of appealability"—"finality." *Id.* at 472. The second involved a fact-intensive, "individualized judicial inquiry"—exhaustively scrutinizing "the plaintiff's resources; the size of his claim and his subjective willingness to finance prosecution of the claim; the probable cost of the litigation and the possibility of joining others who will share that cost; and the prospect of prevailing on the merits and reversing an order denying class certification." *Id.* at 471 n.15. This method "waste[d]" judicial resources and had a "serious debilitating effect on the administration of justice." *Id.* at 473.

Livesay accordingly rejected an *exception* to finality for reasons having nothing to do with final judgments. The "death knell" doctrine was unprincipled and unworkable; it departed from Section 1291's statutory test ("finality"), and required extensive case-by-case inquiries that were inappropriate in a jurisdictional setting. A voluntary dismissal, by contrast, produces an *actual* final judgment. It requires zero additional analysis. The case is unequivocally over in the district court with nothing left to do. It creates no need to grapple with arbitrary and unwieldy fact-intensive analyses. It applies the same bright-line rule from Section 1291 that applies to all other final judgments. In short, it implicates none of *Livesay*'s core concerns.[16]

b. Despite these obvious differences, Microsoft says that a voluntary dismissal is "functionally identical" to the interlocutory orders in *Livesay*. Pet. Br. 23. That is perplexing. This case involves a final judgment; the plaintiffs in *Livesay* "sought review of an inherently nonfinal order that tentatively resolved a question that turns on the facts of the individual case." *Livesay*, 437 U.S. at 477 n.30. The Court can identify a "final decision"

---

[16] Indeed, even the defendant in *Livesay* agreed that voluntary dismissals with prejudice gave rise to appealable final judgments:

> There is also authority for the proposition that the named class representative himself may convert an adverse interlocutory class certification order into an appealable final judgment if he voluntarily dismisses his individual action under Rule 41(a). *See United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958); *Thomsen v. Cayser*, 243 U.S. 66 (1917).

Coopers & Lybrand's Br. at 30 n.20, *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978) (No. 76-1836).

here by simply recognizing the *final judgment*. There is no need to "resuscitate" the unworkable "death-knell" doctrine or contravene *Livesay*'s holding for *interlocutory* orders.

Indeed, it is *Microsoft* who is insisting on improper case-by-case determinations into the *reason* a judgment was entered. "Distinguishing between final judgments entered with the consent of both parties and final judgments entered against one party's wishes would create an extra-statutory condition on appeal. This has little to recommend it, and the possibility has been rejected by the Supreme Court." *Downey* v. *State Farm Fire & Cas. Co.*, 266 F.3d 675, 682 (7th Cir. 2001) (*Downey*) (citing *Pac. R.R.* v. *Ketchum*, 101 U.S. 289, 295 (1879)). Section 1291 directly applies on its own terms, and *Livesay* does not support an exception to its textual command.[17]

---

[17] Microsoft notes that Fed. R. Crim. P. 11(a)(2) has an express provision for "conditional" guilty pleas, and finds it telling that "the civil rules contain no 'conditional dismissal' counterpart." Pet. Br. 20. What Microsoft does not mention is that precisely this argument was rejected by other courts, and for good reason: "for jurisdictional purposes there is no distinction between 'consent' and 'adversarial' judgments. Judgments are judgments, and any party can appeal as of right from a final decision adverse to his interests." *Downey*, 266 F.3d at 682 (tracking and rejecting Microsoft's argument). Moreover, Microsoft mischaracterizes the accompanying advisory committee note. The Committee's discussion addressed the *practical* concern that "conditional pleas conflict with the government's interest in achieving finality" (Fed. R. Crim. P. 11 Advisory Committee's Note to 1983 Amendment); while the *words* are the same, the "state interest in finality" in criminal prosecutions is entirely different from *jurisdictional finality* under Section 1291.

Nor is Microsoft correct that judicial estoppel effectively left the *Livesay* plaintiffs in exactly the same position as respondents. See Pet. Br. 22 (suggesting it is "meaningless formalism" to suggest an *actual* dismissal matters because the plaintiff was "barred" from "going forward on his individual claims just the same").

Microsoft simply plucks the "judicial estoppel" rationale out of thin air. There is no hint that *Livesay* even *considered* judicial estoppel, much less equated those interlocutory orders with actual final judgments. On the contrary, *Livesay* repeatedly noted the nonfinal nature of the order, 437 U.S. at 471, 476; and specifically acknowledged that individual cases might continue. *Id.* at 470 ("the litigation will often survive an adverse class determination")). Indeed, lower courts permitted some "death knell" appeals even where plaintiffs *would continue litigating their individual claims*. A *potential* "death knell" was not always an *actual* "death knell," which was a fundamental problem with the doctrine.

In any event, Microsoft's argument is ahead of its time. Judicial estoppel was not well established in 1978. This Court did not squarely endorse the doctrine until *New Hampshire* v. *Maine*, 532 U.S. 742 (2001), and

---

Finally, Microsoft ignores an essential difference between a guilty plea and a voluntary dismissal: a guilty plea *independently* establishes guilt; without Rule 11, a prior error could not overcome a defendant's "solemn[] admi[ssion] in open court that he is in fact guilty." *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973). A voluntary dismissal, by contrast, says nothing about a party's ability to prove a claim. That is especially true where, as here, a party reserves the right to press the claim if an adverse order is overturned.

multiple circuits emphatically rejected the doctrine before *New Hampshire*. See, *e.g.*, *Webb* v. *ABF Freight Sys., Inc.*, 155 F.3d 1230, 1242 (10th Cir. 1998) ("The Tenth Circuit has firmly established that it will not be bound by the doctrine of judicial estoppel."); *So. Pac. Trans. Co.* v. *ICC*, 69 F.3d 583, 591 n.3 (D.C. Cir. 1995) ("This court, however, has firmly disapproved of judicial estoppel in prior cases."). It accordingly is pure fiction to suggest that *Livesay* understood its holding—grounded directly in the order's *interlocutory* nature—as tantamount to refusing jurisdiction where a plaintiff *actually* dismissed his entire case.[18]

2. *Microsoft also misapprehends Rule 23(f)*

a. According to Microsoft, respondents' "voluntary dismissal tactic" somehow "thwarts" Fed. R. Civ. P. 23(f)'s review process. Pet. Br. 29-33. Microsoft asserts that a voluntary dismissal—which permits an appeal *on final judgment*—"sidestep[s] Rule 23(f)'s carefully crafted compromise" and works an end-run around the Rule.

This is mystifying. Rule 23(f) is designed to permit *interlocutory* appeals; respondents are not attempting

---

[18] In any event, if lower courts had been viewing the "death knell" doctrine with judicial estoppel in mind, they assuredly would not have developed the two unworkable tests rejected in *Livesay*; rather, they would have simply instructed named plaintiffs to make binding representations against pursuing their individual claims. Respondents are unaware of any federal case *ever* subjecting a "death knell" plaintiff to a judicial-estoppel analysis, and Microsoft has cited none. This makes it especially unlikely that *Livesay* had estoppel in mind without uttering a single word about it.

an end-run around the Rule's procedures *because respondents are not attempting an interlocutory appeal.* Those procedures allow plaintiffs to seek immediate review of class-certification orders without risking their right to pursue their individual claims. Respondents have taken a starkly different approach: they have staked their entire action on the incorrectness of the certification ruling.

Respondents are no more circumventing the Rule's procedures—by seeking appellate review as of right—than any other party filing an appeal after litigating a full trial. The judicial discretion afforded by the Rule is limited to the context in which it arises: appellate courts have "unfettered discretion" to decide whether to permit interlocutory review. Fed. R. Civ. P. 23(f) Advisory Committee's Note to 1998 Amendment. But that discretion is not frustrated by parties who forgo Rule 23(f)'s compromise and instead accept the serious risks and costs of obtaining immediate finality.

Indeed, it is telling that Microsoft insists respondents have interfered with the Rule's "compromise" but not its *text*. There is nothing in Rule 23(f)'s plain language that restricts a plaintiff's right to dismiss claims with prejudice to create finality; it simply governs the narrow question addressed by the Rule itself: whether a party (without *any* commitment to abandon a case going forward) can seek immediate review of an adverse interlocutory class ruling.

Nor can Microsoft cite any authority for the odd proposition that Rule 23(f) somehow excised final decisions from Section 1291's scope. The three decisions Microsoft invoked hardly help it; those cases addressed

the converse question, *i.e.*, whether nonfinal orders should nonetheless be viewed as "final decisions" despite the availability of alternative methods of review.[19] Here, because the district court's judgment terminated the entire action, there was no need to expand the definition of finality or create an exception to invoke appellate jurisdiction.

b. Microsoft is also incorrect that respondents' final judgment appeal interferes with Rule 23(f)'s policy. It is true that interlocutory appeals may "disrupt ongoing trial court proceedings and squander resources." *In re D.C. Water & Sewer Auth.*, 561 F.3d 494, 497 (D.C. Cir. 2009). But a voluntary dismissal with prejudice terminates the case; the subsequent appeal will not disrupt any "ongoing proceedings," because there *are* no ongoing proceedings.

In sum, there is simply no basis for thinking that Rule 23(f)'s existence casts any doubt on the propriety of an appeal following a voluntary dismissal. Far from it, the Advisory Committee was aware of manufactured finality as another option for obtaining appellate review.

---

[19] See Pet. Br. 29-30; *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 103 (2009) (considering "whether disclosure orders adverse to the attorney-client privilege" satisfy the collateral order doctrine); *Swint* v. *Chambers Cty. Comm'n*, 514 U.S. 35, 38, 43, 48 (1995) (holding court lacked appellate jurisdiction over the denial of a defendant's motion for summary judgment, and rejecting the appellant's request for "expansion of appellate jurisdiction"); *Dig. Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 865 (1994) (holding "that an order denying effect to a settlement agreement" did not satisfy the collateral order doctrine where it did not resolve "the underlying cause of action").

In its 1996 report to the Committee, for example, the Federal Judicial Center cited *Gary Plastic Packing Corp.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176 (1990), for the proposition that a "class representative's failure to prosecute its individual claims created a final judgment; denial of class certification merged into that judgment."[20] Yet there is no hint in the rule's text or notes disapproving of this "tactic" or suggesting that Rule 23(f) was somehow intended to prohibit it.[21]

II. MICROSOFT'S POSITION REGARDING 28 U.S.C. 1291 IS PREDICATED ENTIRELY ON POLICY ARGUMENTS THAT ARE MISGUIDED AND MISDIRECTED

Unable to root its submission in legal doctrine, Microsoft resorts to naked policy arguments in an attempt to divest the appellate courts of jurisdiction over voluntary dismissals with prejudice. As explained next, those arguments are misguided and misdirected.

---

[20] Thomas E. Willging et al., Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 83 n.310 (Federal Judicial Center 1996).

[21] Indeed, the underlying certification dispute here illustrates the limits of Rule 23(f)'s utility. Notwithstanding that the Ninth Circuit denied respondents' petition for permission to appeal, J.A. 121, the same court ultimately reversed the certification denial, Pet. App. 19a. If a plaintiff believes strongly enough in his certification position and is willing to risk his individual claim to prove it, there is no reason to believe that Rule 23(f) was intended to block that avenue of appeal.

A. The Legal System Has Clear, Built-in Protections That Limit Any Abuse Of Voluntary Dismissals With Prejudice

The thrust of Microsoft's position is that a voluntary dismissal with prejudice carries all the same risks of the "death knell" doctrine and other interlocutory appeals. But that ignores fundamental differences between the two devices, differences that are fatal to Microsoft's position.

Microsoft contends that respondents' position would lead to an "onslaught" of interlocutory appeals of "'discovery orders, evidentiary rulings, or any of the myriad decisions a district court makes before it reaches the merits.'" Pet. Br. 21 (citation omitted); see *Coopers & Lybrand* v. *Livesay*, 437 U.S. at 470, 474. Not so.

Microsoft fails to appreciate the crucial difference between the typical interlocutory appeal and a voluntary dismissal with prejudice. In the former context (including "death knell" appeals), appealing is a costless, no-lose proposition. Regardless of the outcome on appeal, the underlying claims may proceed. By contrast, if a plaintiff loses on appeal of a voluntary dismissal with prejudice, his claims are gone forever. For several reasons, plaintiffs will not cavalierly take that risk.[22]

---

[22] Microsoft downplays the significance of a voluntary dismissal *with prejudice* by insisting that its consequence is no different from a pre-*Livesay* "death knell" appeal, because judicial estoppel prevented a "death knell" plaintiff from proceeding on her individual claims should the adverse certification decision be upheld. Pet. Br. 21-22. As explained herein, however, that argument is untenable.

First, most appeals lose. This alone will minimize the number of plaintiffs who will abandon their entire action to obtain review of an adverse interlocutory ruling. It simply blinks at reality to think that attorneys—at least those who do not want to lose malpractice suits—will respond to every minor setback in litigation by staking their clients' cases on dismissals with prejudice and hopeful appeals. Few will court that risk unless the adverse ruling was truly devastating to the ultimate prospect for relief.

Second, appeals take money and time, neither of which a plaintiff is eager to spend. This, after all, is the plaintiff's suit; he is the one who has been injured and thus suffers most distinctly from any delay, and he will continue to suffer while the appeal is pending. The average appeal could easily delay the entire suit for years over a single issue.[23] Again, unless that issue is truly mission-critical, few rational litigants would accept this considerable obstacle to pursuing relief.

Third, the preceding two points provide even greater deterrents to those plaintiffs who might be tempted to interrupt their suits to complain about the myriad nonfinal rulings that are subject to harmless-error review. See 28 U.S.C. 2111; cf. *Livesay*, 437 U.S. at 472 (expressing concern over "consequences of applying

---

[23] For example, in 2015, the median length of time from notice of appeal to final disposition ranged from 5 months (Eighth Circuit) to 14.3 months (Ninth Circuit). 2015 Federal Court Management Statistics Report, available at http://www.uscourts.gov/statistics-reports/federal-court-management-statistics-december-2015.

these ['death knell'] tests to pretrial orders entered in non-class-action litigation").

Appellate jurisdiction does not mean appellate victory, and, given that a plaintiff is risking his entire case on winning the appeal, it is the odds of the latter that will largely determine the frequency of appeals. Importantly, reversal on appeal is warranted not for any error, but only for errors with unfair consequences, *i.e.*, errors that impair substantial rights. See 28 U.S.C. 2111. Unlike the denial of class certification, however, most interlocutory orders in civil cases do not by themselves "affect the substantial rights of the parties," *id.*, which means that the appellant will generally bear the burden of showing that the complained-of error substantially influenced the outcome. See, *e.g.*, *Shinseki* v. *Sanders*, 556 U.S. 396, 407 (2009); *Matusick* v. *Erie Cty. Water Auth.*, 757 F.3d 31, 50 (2d Cir. 2014) (citing *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946)).[24]

For the vast majority of interlocutory orders, it will be all but impossible for the appellant to carry that burden. See, *e.g.*, Margaret A. Berger, *When, If Ever, Does Evidentiary Error Constitute Reversible Error*, 25 Loy. L.A. L. Rev. 893 (1992) (concluding that, even after

---

[24] An improper denial of class certification is reversible error without any additional showing. Cf., *e.g.*, *Costello* v. *BeavEx, Inc.*, 810 F.3d 1045, 1061 (7th Cir. 2016) (vacating the denial of class certification without mentioning harmless-error standard). It is plain that the denial of class certification impairs substantial rights under Section 2111's standard: the influence of an order denying certification is not merely "substantial," *Kotteakos*, 328 U.S. at 765; it is dispositive. After denial, the class claims have *no* chance of success because they cease to exist.

trial, fewer than 30 out of 20,000 appellants obtained reversal in 1990 based upon evidentiary error).[25]

Put simply, most voluntary dismissals would easily fail harmless error review, meaning fewer still plaintiffs will use dismissal to trigger an appeal.

B. Microsoft's Position Would Frustrate The Efficient Resolution Of Disputes

Microsoft offers a host of other erroneous arguments that a voluntary dismissal will interfere with the proper functioning of the judiciary. But, in truth, it is Microsoft's position that threatens the efficient administration of justice.

1. Microsoft's core policy objection relates to judicial efficiency, insisting that Respondents' position will increase the judiciary's workload by "virtually guarantee[ing] piecemeal appellate review." Pet. Br. 23; see *Livesay*, 437 U.S. at 471. But concern about judicial workload actually cuts in favor of respondents. Unlike an interlocutory appeal, a dismissal with prejudice terminates the trial court proceedings. That leaves two possibilities for the fate of the case, both of which

---

[25] If, for example, one immediately dismisses his case after an adverse evidentiary ruling, the truncated record will make it difficult for an appellant to show that a substantial right was impaired. Cf., *e.g.*, *Morrison Knudsen Corp.* v. *Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1239 (10th Cir. 1999) (explaining that the "risk of doubt" as to showing prejudice on a sparse record must lie with the appellant); *Flores* v. *Cabot Corp.*, 604 F.2d 385, 386 (5th Cir. 1979) (per curiam) (holding that "[w]e cannot determine on the record before us whether the plaintiff's case was materially prejudiced").

conserve judicial resources compared to Microsoft's scheme.

Possibility one is that the voluntary-dismissal plaintiff loses. That means the case is over; it will never clog the district court's docket and waste the judge's, jury's, and parties' time with a trial nobody wants. Possibility two is that the voluntary-dismissal plaintiff wins, creating certainty about the certification issue that in turn ensures that the parties subsequently litigate the merits with the appropriate attention and resources.

Consider instead the world under the rule Microsoft envisions. Imagine a stubborn or irrational plaintiff with a small dollar claim who refuses to give up and wins his trial. That plaintiff will certainly appeal the certification denial, but if he wins the appeal, he may face yet another procedural obstacle: a retrial of the merits on a classwide basis (on the theory that it would be unfair to the defendant to use the individual, small-dollar verdict as the basis for massive classwide relief). See Note, *Interlocutory Appeal From Orders Striking Class Action Allegations*, 70 Colum. L. Rev. 1292, 1293-1294 (1970) (discussing reasons why a court might order retrial and other issues). In that scenario, Microsoft's approach is spectacularly wasteful. It requires *two* trials; in contrast, the voluntary dismissal approach requires either one trial (if the post-dismissal certification appeal is successful) or no trial (if the post-dismissal certification appeal loses).

Things do not improve if the parties believe that a new, post-certification trial will *not* be ordered, *i.e.*, if the sole individual trial will also determine the class's relief. There, any case with significant classwide exposure will

have to be litigated *as if* a fortune is at stake. Millions of dollars (and countless hours of judiciary and party time) will be consumed in ways that ultimately no rational person would endorse.[25]

In sum, the only realistic way that Microsoft's position truly spares any resources is if plaintiffs throw in the towel. So, yes: the judiciary will save time and effort if plaintiffs—discouraged by the prospect of having to pursue a paltry individual sum for the bare opportunity of seeking review—simply give up. But those judicial "savings" come at the serious and illegitimate cost of forcing individuals to abandon statutory rights and acquiesce in significant aggregate social harm.

2. Microsoft also expresses concern about the proper allocation of duties between appellate and trial judges, suggesting that Respondents' position will "disrupt[] the proper balance between district and

---

[25] Microsoft argues that a voluntary dismissal might force an appellate court to decide a difficult class-certification issue that could otherwise be avoided if the plaintiff loses on the merits of his individual claim. Pet. Br. 27-28. But that objection produces at most a wash: in some cases, the merits question might well be even more complicated than the certification issue; affirmance on certification would obviate the necessity of considering the merits; and the parties could settle either way. To be sure, the appeals court might reverse on adequacy and the trial court might then still deny certification on other grounds, leaving the plaintiff again in the position of seeking review of that subsequent denial. Cf. *Livesay*, 437 U.S. at 474. But the streamlined voluntary-dismissal procedure still avoids the costs associated with that repetition.

appellate courts." Pet. Br. 14; see *id.* at 27-28; *Livesay*, 437 U.S. at 476. Microsoft's concern is unwarranted.

Because interlocutory appeals spring from pending cases that will survive the appeal, there is no risk to appealing every issue; the case goes on either way. The menace of risk-free appeal can threaten the trial judge's control of the proceeding and undermine her ability to render decisions that command respect from the parties. But there is no analog here. A plaintiff considering a voluntary dismissal will have to weigh carefully the likelihood of success on appeal before he questions a district court's decision, and the harmless error doctrine makes it particularly unlikely that a plaintiff will routinely feel comfortable staking his entire lawsuit on the success of an appeal.

3. Microsoft's suggested rule also pays insufficient heed to the point of class actions. "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 617 (1997) (citation and internal quotation marks omitted).

Tellingly, Microsoft never admits the obvious upshot of its position: if most parties are required to litigate a full trial—despite having no desire to litigate individually—the vast majority of cases involving small-value claims will simply *disappear* after an adverse class certification ruling. The relevant threat to the court system is thus not piecemeal review, but *no review at all.* Microsoft cannot seriously deny that some disputes are so costly to litigate "that only a lunatic or a fanatic"

would pursue them individually. *Carnegie* v. *Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.). To require unsuccessful class plaintiffs to act irrationally—to pay for a seven-figure trial of a seven-dollar claim—merely to exercise their appeal rights makes no sense. It would mean that defendants would win cases (including some wrongly decided) without ever facing an appeal, because the plaintiffs simply give up.

It is hardly consistent with effective judicial administration to immunize legal violations from review in this fashion. To the contrary, Microsoft's position impedes the legislative objective of punishing wrongdoers even where claims have only minimal value. While each individual claim may be insignificant on its own, the aggregate harm imposed by defendants' behavior is staggering. There is an obvious interest in reading Section 1291 to mean what it says and preserve the practical ability of litigants to assert their rights.

4. Microsoft's final policy point again misapprehends *Livesay*, asserting that, like the "death knell" doctrine, the voluntary dismissal here "'operates only in favor of plaintiffs.'" Pet. Br. 28 (quoting *Livesay*, 437 U.S. at 476). But there is no conceptual overlap, of course, between *what* is final and *who* may benefit from it. In any event, as applied to class situations, this consequence merely puts a plaintiff on equal footing with a defendant.

Microsoft wants to leave the prospect of appellate review only to a plaintiff who is rich enough or, in Judge Posner's colorful terms, "lunatic" enough to spend a fortune to recover a farthing in the hopes of overturning certification denial. But, as discussed above, even that plaintiff may have to litigate the merits a second time if

the defendant can convince the trial court to grant retrial. The voluntary-dismissal device efficiently short-circuits that process, and will also benefit defendants, who should value certainty about the class issue just as much as plaintiffs. See *Livesay*, 437 U.S. at 476.

C. In Any Event, Microsoft's Attempt To "Refine When A District Court Ruling Is 'Final'" Should Be Addressed Through Rulemaking

As explained above Microsoft's policy arguments are misguided. They are also misdirected.

The definition of finality and the propriety of interlocutory appeals are areas where this Court has expressed particular solicitude for the rulemaking process. The Court made clear in *Swint* v. *Chambers Cty. Comm'n*, 514 U.S. 35, 48 (1995), that "rulemaking under § 2072" is the appropriate procedure "to clarify when a decision qualifies as 'final' and when an interlocutory order is appealable." *Ibid.*

This is especially true given the nature of Microsoft's request here. It is far from clear that Congress—in passing Section 2072(c)—intended to provide any authority to revisit the long-settled understanding that the term "final decisions" in 28 U.S.C. 1291 extends to all final judgments.[27]

---

[27] To the contrary, it seems likely that Congress was merely authorizing rulemakers to define when a *prejudgment* ruling of a district court is final for purposes of 28 U.S.C. 1291. See pp. 5-6, *supra* (explaining the genesis of 28 U.S.C. 2072(c)). Indeed, the notion that a case-closing final judgment is always a final decision for purposes of 28 U.S.C. 1291 has been settled law for decades. See, e.g., *Abney* v. *United States*, 431 U.S. 651, 658 (1977) ("*While a final*

If it did, however, such a significant policy-shift would be a paradigmatic example of the type of "value judgments" that are "better left to the 'collective experience of bench and bar' and the 'opportunity for full airing' that rulemaking provides." *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 118-119 (2009) (Thomas, J., concurring) (quoting the majority opinion).

III. THERE WAS NO ARTICLE III OBSTACLE PREVENTING NINTH CIRCUIT REVIEW OF THE ORDER STRIKING CLASS ALLEGATIONS

A. Respondents' Individual Claims Were Impaired By The Class Order, And Respondents Expressly Reserved Their Rights To Challenge That Impairment

Microsoft maintains that Article III bars appellate jurisdiction because the case is moot. According to Microsoft, respondents voluntarily dismissed their own claims and thus forfeited any ability to challenge that dismissal on appeal. As Microsoft understands it, a party cannot be aggrieved by an order it affirmatively requested, which eliminates any live case or controversy for a court to resolve. On multiple levels, Microsoft is mistaken.

1. As an initial matter, Microsoft is incorrect that this issue implicates any jurisdictional question at all. This is a *waiver* issue, not a *jurisdictional* issue.

---

judgment always is a final decision, there are instances [such as collateral orders] in which a final decision is not a final judgment.") (quoting *Stack* v. *Boyle*, 342 U.S. 1, 12 (1951) (Jackson, J. separate opinion)) (emphasis added).

"Judgments are judgments, and any party can appeal as of right from a final decision adverse to his interests." *Downey*, 266 F.3d at 682; see also, *e.g.*, *United States* v. *Babbitt*, 104 U.S. 767 (1881). There is no question that this judgment is adverse to respondents' interests: the final judgment dismissed their claims with prejudice, and the prior class ruling merges directly into that final judgment. Even if respondents somehow abandoned their rights (which they did not), "[w]aiver affects, not a court's power to hear the case, but whether as a practical matter it has any job to do." *Downey*, 266 F.3d at 683.

And it is clear that the courts here still have a job to do, as respondents did *not* abandon their rights. In seeking a voluntary dismissal, respondents were unequivocal that the dismissal was predicated on reserving the right to challenge the court's rulings and revive their claims should they prevail on appeal.[28] This is a classic reservation of rights, and such a reservation "is incompatible with waiver." *Ibid.*[29]

---

[28] In respondents' motion to dismiss with prejudice, they explained their intent "'to appeal the Court's March 27, 2012 order (Dkt. 32) striking Plaintiffs' class allegations.'" Pet. App. 39a (quoting J.A. 122-123).

[29] Microsoft argues that respondents were still responsible for the ultimate dismissal: they had the choice to litigate their individual claims, and they cannot now blame the class-certification ruling (or anyone but themselves) for seeking a voluntary dismissal. This fundamentally misunderstands the nature of respondents' decision: respondents did not move to dismiss their *original* claims, but the *impaired* version of their claims that was left after the district court struck the class allegations. That ruling left respondents with diminished rights that (as a matter of law and fact) were not the same rights asserted in the complaint. Parties are entitled to pursue

This dooms Microsoft's position: the final judgment with prejudice is adverse to respondents' interests, and their express reservation eliminates any waiver. That satisfies both Section 1291's finality requirement and Article III's justiciability requirement. Microsoft conspicuously fails to explain why this express reservation is somehow invalid. It cannot now evade appellate review over the very issues that aggrieved respondents and were expressly preserved in their voluntary dismissal.

2. In response, Microsoft argues that respondents overlook the "sturd[y]" rule that parties who voluntarily dismiss their complaints cannot later appeal: if a party "'voluntarily become[s] nonsuit, [he] cannot sue out a writ of error.'" Pet. Br. 35 (quoting *Cent. Transp. Co.* v. *Pullman's Palace Car Co.*, 139 U.S. 24, 39 (1891), in turn citing *United States* v. *Evans*, 9 U.S. (5 Cranch) 280 (1809), and *Evans* v. *Phillips*, 17 U.S. (4 Wheat.) 73 (1817)). According to Microsoft, it is settled that parties cannot complain of dismissals they invite, and Microsoft says that Respondents' theory is at odds with that rule.

This argument supplies the core of Microsoft's position—and it rests on an unacknowledged, fatal error. Microsoft has overlooked that, in the 1800s, *voluntary*

---

an all-or-nothing approach to litigation. There is no rule of law or logic that forces a party to litigate a version of a claim it never wished to bring. The only Article III question is whether there is a final decision adverse to the party; if the party dismissed the right to pursue a weaker version of the claim but *reserved* the right to restore the original claim, there is neither a jurisdictional impediment nor waiver, and Microsoft errs in suggesting otherwise.

nonsuits were "without prejudice." In re Skinner & Eddy Corp., 265 U.S. 86, 92-93 (1924) (emphasis added);[30] see also, *e.g.*, *Cent. Transp. Co.*, 139 U.S. at 39 ("'in the case of a nonsuit a new action may be brought'"); *Haldeman* v. *United States*, 91 U.S. 584, 585 (1875) ("[n]onsuits * * * do not preclude the institution and maintenance of subsequent suits"); *Chira* v. *Lockheed Aircraft Corp.*, 634 F.2d 664, 665 n.7 (2d Cir. 1980) ("The dismissal available at common law was without prejudice.").[31] A dismissal without prejudice does not impair a party's Article III interests, because they can always seek the same relief again in the same forum. See, *e.g.*, *Rudolph* v. *Sensener*, 39 App. D.C. 385, 387-388 (1912) ("no appeal lies from the entry [of a

---

[30] This rule had a limited exception when "a dismissal of the bill would prejudice the defendants in some other way than by the mere prospect of being harassed and vexed by future litigation of the same kind." *In re Skinner & Eddy Corp.*, 265 U.S. at 93 (internal quotation marks omitted). But nothing in *Evans*, *Phillips*, or *Central Transportation* suggests those cases turned on the exception, not the rule.

[31] In fact, the common law itself provided two different mechanisms for voluntarily dismissing actions: the nonsuit, which left the plaintiff free to refile, and the "retraxit," which did not. In Blackstone's words as relayed by this Court, "[t]he nonsuit is a mere default or neglect of the plaintiff, and therefore he is allowed to begin his suit again upon payment of costs; but a *retraxit* is an open, voluntary renunciation of his claim in court, and by this he forever loses his action." *United States* v. *Parker*, 120 U.S. 89, 95 (1887) (quoting 3 Comm. 296); see also, *e.g.*, *Haldeman* v. *United States*, 91 U.S. at 585 (distinguishing a nonsuit from a *retraxit*, and holding that a judgment stating "that the said suit is not prosecuted, and be dismissed" was a nonsuit and not a *retraxit*, meaning the party did not "forever los[e] their action").

nonsuit] because the action may be brought anew") (citing *Cent. Transp. Co.*, 139 U.S. at 39). That factor, and not the *voluntary* component, is what drove those decisions.[32]

Respondents' case falls in a distinct category. This final judgment was entered *with* prejudice. It captured (via merger) an interlocutory ruling that was devastating to respondents' legal rights and their practical ability to pursue their claims. That is sufficient to preserve Article III jurisdiction.

Indeed, this case aligns perfectly with *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958), a case that Microsoft misreads. In *Procter & Gamble*, the Court permitted the government to appeal from a judgment it directly invited in order to challenge an interlocutory discovery order. 356 U.S. at 678-679. The government might have pursued other means of challenging the order, and nothing suggests the order prevented the government from litigating the case to final judgment. But the Court allowed the appeal anyway (without any Article III obstacle), because the government had "at all times opposed the production orders" and invited the dismissal sanction as a "way of getting review of the adverse ruling." *Id.* at 680; see also, *e.g.*, *OFS Fitel, LLC*

---

[32] Microsoft makes the same mistake in relying on *Kelly* v. *Great Atl. & Pac. Tea Co.*, 86 F.2d 296 (4th Cir. 1936), quoting the Fourth Circuit's declaration that "it is well settled in the federal courts that no appeal lies from a judgment of voluntary nonsuit." Pet. Br. 35 (quoting 86 F.2d at 297). Again, Microsoft ignores the context: *Kelly* confirmed that a nonsuit leaves a "plaintiff at liberty to commence another action for the same cause." 86 F.2d at 297.

v. *Epstein, Becker, and Green, P.C.*, 549 F.3d 1344, 1353 (11th Cir. 2008) (adopting this understanding of *Procter & Gamble*).

Just as the government was permitted to challenge the interlocutory ruling—and preserve its claims—respondents are entitled to do so here.

3. Finally, Microsoft argues that a voluntary dismissal survives Article III only where a prior order "effectively decides the plaintiff's claim on the merits." Pet. Br. 37. But this was surely untrue in *Procter & Gamble*, where the prior order involved *discovery*, not the merits. To be clear: it was only the government's *invitation to dismiss* (as a proposed sanction) that prompted the ultimate judgment. 356 U.S. at 679-680; contra Pet. Br. 37 (incorrectly suggesting the court *initially* ordered compliance "on pain of dismissal," rather than at the government's urging).

In fact, Microsoft's position only proves *Respondents'* point. There is no rule of Article III that restricts live controversies to those that *destroy*, rather than *impair*, an interest.[8] What matters is that parties disagree over

---

[8] The striking of the class allegations both legally and practically impairs respondents' claims. As a legal matter, the stricken class claims permit added recovery: the adverse order deprived respondents of the right to seek incentive awards and attorney's fees, and it eliminated their right to spread costs among the full class. As a practical matter, it destroyed the proceeding entirely. A small value claim is effectively worthless outside the class context: only a zealot or a lunatic engages in extensive complex litigation over a $30 claim. Without the prospect of class proceedings, no one invests the resources to prove a claim worth substantially less than the cost of litigation.

a concrete and particularized legal issue. It is not difficult to identify the concrete and particularized issue dividing the parties here.

Indeed, this Court implicitly recognized as much in *Gabelli* v. *SEC*, 133 S. Ct. 1216 (2013). In Gabelli, the SEC asserted three claims in its complaint. *SEC* v. *Gabelli*, 653 F.3d 49, 55 (2d. Cir. 2011). The district court dismissed the first two claims and significantly limited the remedies available for the third. *Id.* at 56. Such an order was obviously interlocutory: the third claim remained live, albeit with limited remedies. But the SEC, "believing that [the remaining remedy] would not provide significant relief," voluntarily dismissed the third claim and sought to reserve the ability to re-assert that claim upon remand if it were successful in its appeal. *Ibid.*

The Second Circuit expressly considered its jurisdiction over the appeal and held that the judgment was final. *Ibid.* It went on to hold that the district court erred in dismissing the first two claims, *id.* at 57-58, and erred in limiting the remedies available for the third claim, *id.* at 61. This Court granted certiorari on a remedial question pertaining to the third claim. 133 S. Ct. 97. At no point did the Court question the propriety of the Second Circuit's jurisdiction.

B. Even If The Voluntary Dismissal In This Case Did Moot Respondents' Individual Claims, It Did Not Moot The Lawsuit

According to Microsoft, an Article III problem arises if a successful appeal on the class question would not revive the respondents' individual claims. If the respondents are forbidden from ever obtaining their

individual damages, Microsoft argues, they have lost any "personal stake" in the litigation, and thus have no Article III standing to bring an appeal.

Microsoft is wrong. Respondents have two distinct interests in obtaining reversal of the district court's decision: a personal economic stake and a noneconomic procedural interest. These are both entirely distinct from respondents' ability to recover their individual damages, and under this Court's established precedent, either one of these interests is sufficient to satisfy Article III.[34] Respondents' economic stake in the appeal is their potential ability to obtain an incentive reward if the class were ultimately successful. Their non-economic stake is their procedural interest in having the class certified.

---

[34] Microsoft contends that respondents have "'forfeited' the right to make any argument now predicated on their proposed class representation." Pet. Br. 39. But respondents' stipulation reserved all their rights without expressly disclaiming anything. Microsoft cannot seriously contend that respondents have waived arguments they had no occasion to make: the Ninth Circuit, correctly, upheld their ability to appeal, and the Ninth Circuit upheld respondents' full rights (as individuals and class members) at every stage of the appeal. There was thus no reason for respondents to assert a lesser interest. Should the Court conclude that respondents somehow lost their individualized rights, they will then be in a positon to assert other rights associated with their representation of the class. But Microsoft is simply wrong that respondents failed to preserve an issue that was not squarely presented in light of the current posture of this case.

1. *Under* Deposit Guaranty National Bank v. Roper, *445 U.S. 326 (1980), respondents have an economic interest in class certification that satisfies Article III*

In *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326 (1980), this Court held without qualification that a named plaintiff in a class action could appeal an adverse class certification ruling even though his individual entitlement to damages would be unaffected by the disposition of the appeal.

The plaintiffs in *Roper* sought to bring a class action on behalf of 90,000 Mississippi credit card holders who had been charged illegal interest rates. *Roper*, 445 U.S. at 328. The district court denied class certification and the Fifth Circuit denied the plaintiffs' motion for interlocutory appeal. *Roper*, 445 U.S. at 329. The defendant "then tendered to each named plaintiff * * * the maximum amount that each could have recovered * * *, including legal interest and court costs." *Id.* at 329. The plaintiffs refused the offer, but the district court nonetheless entered judgment in the plaintiffs' favor, took the money into the court registry, and dismissed the case. *Id.* at 330.

Rejecting the argument that the plaintiffs lacked a personal stake in the appeal, the Court held that the named plaintiffs' "*individual* interest in the litigation * * * is sufficient to permit their appeal of the adverse certification ruling." *Id.* at 340. But the Court did not rest its holding on the plaintiffs' ability to recover their individual damages.

Rather, the Court found the possibility that the plaintiffs might "shift to successful class litigants a

portion of those fees and expenses that have been incurred" to be enough of a personal economic stake to satisfy Article III. See *Id.* at 334 n.6; see also *id.* at 336-337 (explaining that "[f]ederal appellate jurisdiction is limited by the appellant's personal stake in the appeal[, and identifying such interest as the plaintiffs'] desire to shift part of the costs of litigation to those who will share in its benefits if the class is certified and ultimately prevails").

Like the plaintiffs in *Roper*, the respondents' interest in the lawsuit is not limited to their individual entitlement to damages. As a result, even if respondents have lost the ability to recover those individual damages, they retain an economic incentive to obtain reversal of the district court's erroneous decision to strike respondents' class allegations. Specifically, respondents may eventually obtain an "incentive reward" for winning efforts.

As Judge Posner recently explained, named plaintiffs who have settled their individual claims may be eligible for an "incentive reward * * * for their services as the class representatives." *Espenscheid* v. *DirectSat USA, LLC*, 688 F.3d 872, 874 (7th Cir. 2012). Like the plaintiffs in *Espenscheid*, respondents here may be able to obtain an incentive reward if the class action is ultimately successful against Microsoft.[35] And "the prospect of such

---

[35] To be sure, an incentive award will depend on the class eventually being certified (and some class recovery), but every aspect of litigation is speculative or "probablistic rather than certain." *Espenscheid*, 688 F.3d at 875. Incentive awards are calculated within the discretion of the district court, see *In re Mego*

a payment, though probabilistic rather than certain, suffices to confer standing." 688 F.3d at 875.

This is because the potential incentive reward is an economic stake that is separate from the damages award. See *Espenscheid*, 688 F.3d at 875 (acknowledging that settlement means that named plaintiff "will no longer have a stake in any damages that may be awarded to the class" but concluding that named plaintiff has standing to appeal adverse class certification decision).

Microsoft theorizes that *Roper* does not apply because respondents' claims here were not dismissed "against their will or even by happenstance." Pet. Br. 40. It is true that this Court in *Roper* said that the "factual context," meaning the plaintiffs' opposition to the entry of judgment in that case, was "important." 445 U.S. at 332. And indeed this Court even invoked "settlement of all personal claims" as an example of a situation in which

---

Fin. Corp. Sec. Litig., 213 F.3d 454, 463 (9th Cir. 2000), and there is nothing to suggest that dismissal of respondents' individual claims would preclude an award. To the contrary, the relevant factors suggest that respondents' willingness to sacrifice their own claims for the benefit of the class would weigh in favor of an award. See *Pelletz* v. *Weyerhaeuser Co.*, 592 F. Supp. 2d 1322, 1329 (W.D. Wash. 2009) ("The criteria that courts have used in considering the propriety and amount of an incentive award include: (1) the risk to the class representative in commencing a class action, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation; and (5) the personal benefit, or lack thereof, enjoyed by the class representative as a result of the litigation.").

the court loses "jurisdiction over the controversy of the individual plaintiffs." 445 U.S at 332.

In its reply, Microsoft will undoubtedly attempt to make hay out of language such as this. But the reasoning in *Roper* had nothing to do with the involuntary nature of the dismissal in that case. See *Richards* v. *Delta Air Lines, Inc.*, 453 F.3d 525, 528-529 (D.C. Cir. 2006) (reaching same conclusion). Instead, it rested on the Court concluding that there was and is a distinction between a plaintiff's ability to appeal the lower court's disposition of his individual claims and his ability to appeal the lower court's disposition of the class allegations. *Id.* at 336-337. So too here.

Microsoft also claims that respondents' voluntary dismissal deprives them of the ability to make an "argument for spreading attorney's fees or costs." Pet. Br. 40. Microsoft again misses the point of *Roper*: where a named plaintiff has an economic stake—even a speculative and/or modest one—in the success of an appeal, the named plaintiff has a sufficient personal stake to satisfy Article III. Respondents here indisputably have such a personal economic interest: the possibility of an incentive reward.

2. *Respondents also have the same noneconomic interest in obtaining class certification that was endorsed by* United States Parole Commission v. Geraghty, *445 U.S. 388 (1980)*

Independent of their economic stake in the lawsuit, respondents have a representational stake in the appeal that satisfies Article III. This Court in *Roper* recognized that named plaintiffs in a class action have a "responsibility to represent the collective interests of the

putative class" that is separate from their "private interest" in the lawsuit. *Roper*, 445 U.S. at 331-332.

In *Roper*, the plaintiffs' economic interest in the outcome of the appeal permitted the Court to find Article III satisfied solely on the basis of the named plaintiffs' "private interests." 445 U.S. at 332. But it is clear from *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), decided the same day as *Roper*, that even where a private economic interest no longer exists, a named plaintiff may pursue an appeal of an adverse class determination.

In *Geraghty*, prisoner John Geraghty brought a class action challenging the federal parole release guidelines. *Geraghty*, 445 U.S. at 393. The district court denied class certification. *Ibid.* During the pendency of his appeal, Geraghty was released from prison. *Id.* at 394. And Geraghty did not claim to have any personal economic stake in the litigation. As a result, Geraghty's "personal claim [had] become 'moot.'" *Id.* at 390.

Nonetheless, the Court found Article III satisfied, on the ground that Geraghty possessed a personal *non-economic* stake in vindicating his procedural "right" to obtain class certification. *Id.* at 402. The Court distinguished between the named plaintiff's interest in his own claim for relief and the named plaintiff's interest in class certification: "A plaintiff who brings a class action presents two separate issues for judicial resolution. One is a claim on the merits; the other is the claim that he is entitled to represent a class." *Ibid.*

The mooting by expiration of the plaintiff's personal claim did not rob the named plaintiff of standing to pursue the class certification claim. To the contrary, the

Court held that the requirements of Article III were satisfied "with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits" was gone and beyond revival. *Geraghty*, 445 U.S. at 404. If we assume respondents' individual claims here are truly moot, like in *Geraghty*, the fact that the mootness here arose for a different reason than in *Geraghty* does not alter the basic lesson of that case, which is that a named plaintiff's personal claims on the merits do not constitute his sole cognizable interest in class litigation. Indeed, the respondents here have an even a stronger representational claim than *Geraghty* did, because they were willing to risk their own entitlement to damages in order to obtain an immediate appeal of the district court's order striking class allegations from their complaint. The lawsuit is therefore not moot.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

BRENDAN S. MAHER
Counsel of Record
DANIEL L. GEYSER
DOUGLAS D. GEYSER
Stris & Maher LLP
6688 N. Central Expy., Ste. 1650
Dallas, TX 75206
(213) 995-6805
brendan.maher@strismaher.com

SHAUN P. MARTIN
University of San Diego
School of Law
5998 Alcalá Park
San Diego, CA 92110

ROBERT L. ESENSTEN
Esensten Law
12100 Wilshire Blvd., Ste. 1660
Los Angeles, CA 90025

JEFFREY M. OSTROW
JONATHAN M. STREISFELD
Kopelowitz Ostrow Ferguson
Weiselberg Gilbert P.A.
1 West Las Olas Blvd., Ste. 500
Fort Lauderdale, FL 33301

PETER K. STRIS
RADHA A. PATHAK
DANA BERKOWITZ
VICTOR O'CONNELL
THOMAS E. LOGAN
Stris & Maher LLP
725 S. Figueroa St., Ste. 1830
Los Angeles, CA 90017

DARREN T. KAPLAN
Stueve Siegel Hanson LLP
1359 Broadway, Ste. 2001
New York, NY 10018

MARK A. GRIFFIN
AMY WILLIAMS-DERRY
BENJAMIN GOULD
Keller Rohrback LLP
1201 Third Ave., Ste. 3200
Seattle, WA 98101

PAUL L. STRITMATTER
BRADLEY J. MOORE
Stritmatter Kessler Whelan
Koehler Moore Kahler
200 Second Ave. West
Seattle, WA 98119

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
JUN 15 2016
OFFICE OF THE CLERK

No. 15-457

IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

v.

SETH BAKER, ET AL.,

Respondents.

On a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

Bradford L. Smith
David M. Howard
Timothy G. Fielden
Microsoft Corporation
One Microsoft Way
Redmond, WA 98052

Charles B. Casper
Montgomery, McCracken
Walker & Rhoads, LLP
123 South Broad Street
Philadelphia, PA 19109

Jeffrey L. Fisher
559 Nathan Abbott Way
Stanford, CA 94305

Stephen M. Rummage
Counsel of Record
Fred B. Burnside
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101
(206) 622-3150
steverummage@dwt.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

REPLY BRIEF FOR PETITIONER 1

ARGUMENT 2

I. If Respondents Could Resume Litigating Their Individual Claims, Then The District Court's Judgment Is Not Final 3

A. The Voluntary Dismissal Tactic Would Violate Section 1291. 3

B. The Voluntary Dismissal Tactic Would Upend Fed. R. Civ. P. 23(f). 16

II. If Respondents Could Not Resume Litigating Their Individual Claims, This Case Is Moot. 18

A. Individual Claims 18

B. Claims Related To The Putative Class 20

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

Cases

Abney v. United States,
431 U.S. 651 (1977) 5

Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.,
738 F.3d 960 (9th Cir. 2013) 3

Arbaugh v. Y&H Corp.,
546 U.S. 500 (2006) 5

Berry v. Schulman,
807 F.3d 600 (4th Cir. 2015) 20

Camesi v. Univ. of Pittsburgh Med. Ctr.,
729 F.3d 239 (3d Cir. 2013) 7

Catlin v. United States,
324 U.S. 229 (1945) 3

Cobbledick v. United States,
309 U.S. 323 (1940) 15

Cohn v. United States,
872 F.2d 533 (2d Cir. 1989) 4

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) ..... *passim*

Davis v. Wakelee,
156 U.S. 680 (1895) 10

Deakins v. Monaghan,
484 U.S. 193 (1988) 18

Deposit Guar. Nat'l Bank v. Roper,
445 U.S. 326 (1980) 1, 21, 22

Easton v. City of Boulder, Colo.,
776 F.2d 1441 (10th Cir. 1985) 4

Edwards v. First Am. Corp.,
798 F.3d 1172 (9th Cir. 2015) 9

Gabelli v. SEC,
133 S. Ct. 1216 (2013) 6

Gardner v. Westinghouse Broad. Co.,
437 U.S. 478 (1978) 1, 6

Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
903 F.2d 176 (2d Cir. 1990) 17

Genesis Healthcare Corp. v. Symczyk,
133 S. Ct. 1523 (2013) 22

In re IKO Roofing Shingle Prods. Liab. Litig.,
757 F.3d 599 (7th Cir. 2014) 9

Kelly v. Great Atl. & Pac. Tea Co.,
86 F.2d 296 (4th Cir. 1936) 19

Madden v. Midland Funding, LLC,
786 F.3d 246 (2d Cir. 2015) 9

Milberg LLC v. Bobbitt, cert. pending,
No. 15-734 8

Mohawk Indus., Inc. v. Carpenter,
558 U.S. 100 (2009) 16

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983) 6

Page Plus of Atlanta, Inc. v. Owl Wireless, LLC,
733 F.3d 658 (6th Cir. 2013) 4, 7

Reyes v. NetDeposit, LLC,
802 F.3d 469 (3d Cir. 2015) 9

Roberts v. Texaco, Inc.,
979 F. Supp. 185 (S.D.N.Y. 1997) 21

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.,
559 U.S. 393 (2010) 15

Shane Group, Inc. v. Blue Cross Blue Shield,
___ F.3d ___, 2016 WL 3163073
(6th Cir. June 7, 2016) 21

Sherman v. Westinghouse Savannah River Co.,
263 F. App'x 357 (4th Cir. 2008) 3

Staton v. Boeing Co.,
327 F.3d 938 (9th Cir. 2003) 20

In re Sw. Airlines Voucher Litig.,
799 F.3d 701 (7th Cir. 2015) 20

Swint v. Chambers County Comm'n,
514 U.S. 35 (1995) 16, 18

United Airlines v. McDonald,
432 U.S. 385 (1977) 6

United States Parole Comm'n v. Geraghty,
445 U.S. 388 (1980) 1, 2, 22

United States v. Procter & Gamble Co.,
356 U.S. 677 (1958) 5, 6

Constitutional and Statutory Provisions

U.S. Const. art. III 1, 19, 20

28 U.S.C. § 1291 ..... *passim*

Fed. R. Civ. P. 23(f) ..... *passim*

Fed. R. Crim. P. 11 ..... 7, 17

Other Authorities

Thomas E. Willging, et al., *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (Fed. Judicial Ctr. 1996) 16

Respondents' mantra is "final is final," and they argue the procedural posture here is different from *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), because the plaintiffs there did not dismiss their claims and secure a judgment before appealing. But respondents never come to grips with the import of the purportedly *conditional* nature of their dismissal. Specifically, respondents maintain that if the denial of class certification is reversed, they may resume pursuing their individual claims. Resp. Br. 15; *accord id.* at 45. But if a reversal on class certification would bring their dismissed claims back to life, even though class certification "in no way touch[es] on the merits" of the claims, *Gardner v. Westinghouse Broad. Co.*, 437 U.S. 478, 482 (1978), then the district court's judgment cannot be final. Indeed, if respondents may resume pursuing their claims simply because an appellate court renews the possibility of class certification, then this case is exactly like *Livesay* in every way that matters.

Respondents are also wrong about Article III. If respondents' dismissal of their individual claims created a final judgment—because the claims are truly "gone and beyond revival," Resp. Br. 57—it inescapably follows that this case is moot. Respondents seek refuge in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), and *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980). But unlike the plaintiffs in those cases, respondents voluntarily abandoned their individual claims. Whatever precedential force the "flexible" mootness analysis in those cases might have when plaintiffs' claims evaporate through no

fault of their own, *Geraghty*, 445 U.S. at 400-01, there is no equitable or prudential reason to extend those cases to find an actual case or controversy here.

Finally, respondents' policy arguments fall flat. Respondents say foreclosing a right to manufacture appeals when class certification denials make it economically imprudent to litigate individual claims may force plaintiffs to "give up" on viable class actions. Resp. Br. 40. In reality, Microsoft seeks nothing more than the status quo. *Livesay* precludes a right to appeal on death knell grounds, and the drafters of Federal Rule of Civil Procedure 23(f) considered all of the arguments respondents make—along with countervailing concerns such as judicial efficiency—and settled on a system of discretionary review. No policy reason, much less legal principle, suggests this Court should upend that balanced response to these dynamics.

ARGUMENT

This case reduces to a simple either/or proposition: Either the voluntary dismissal lacks finality under 28 U.S.C. § 1291 because respondents could resume litigating their claims without any appellate decision relating to the merits of the claims, or the case is moot because respondents' claims cannot under any circumstances spring back to life. Either way, respondents have no appellate rights.

I. If Respondents Could Resume Litigating Their Individual Claims, Then The District Court's Judgment Is Not Final.

A. The Voluntary Dismissal Tactic Would Violate Section 1291.

Respondents do not challenge any ruling affecting the merits of their individual claims—nor do they assert any error in the dismissal of those claims. Yet they maintain that if they persuade an appellate court that the district court's denial of class certification was erroneous, they may resume "pursu[ing] their individual claims." Resp. Br. 15. In other words, respondents purport to have *conditionally* dismissed their claims, subject to revival upon reversal of a procedural order.

Contrary to respondents' arguments, the plain text of Section 1291 offers no support for appellate jurisdiction in these circumstances, and *Livesay* forecloses it.

1. A true "final decision" "ends the litigation on the merits and leaves nothing for the [district] court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). In that situation—both inside the class action realm and out—the lawsuit is over unless an appellate court identifies some district court error affecting the merits of the plaintiff's claims. *See, e.g., Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 967 (9th Cir. 2013) (leaving district court judgment intact because erroneous denial of peremptory challenge did not "affect[] the substance of the case as opposed to the procedural right"); *Sherman v. Westinghouse Savannah River Co.*, 263 F. App'x 357, 368 (4th Cir. 2008) (refusing to address "issue of whether the

district court abused its discretion in denying class certification" because it properly rejected claims on the merits); *Cohn v. United States*, 872 F.2d 533, 534 (2d Cir. 1989) (same); *Easton v. City of Boulder, Colo.*, 776 F.2d 1441, 1447 (10th Cir. 1985) (leaving district court judgment intact because erroneous decision to bifurcate trial did not affect merits).

But that is not the situation respondents maintain they have constructed here. Instead, respondents purport to have conditionally dismissed their claims—"reserv[ing] the right to press the[ir] claim[s] if an adverse order [having nothing to do with the merits] is overturned." Resp. Br. 30 n.17.

"A *conditional* dismissal by its nature does not meet the traditional test of finality—a litigation-ending decision that 'leaves nothing' for the district court 'to do but execute the judgment' on the merits." *Page Plus of Atlanta, Inc. v. Owl Wireless, LLC*, 733 F.3d 658, 660 (6th Cir. 2013) (quoting *Catlin*, 324 U.S. at 233). To the contrary, a conditional dismissal creates only the *possibility* of finality. It terminates the lawsuit only if an appellate court fails to reverse an interlocutory procedural order having nothing to do with the merits of the plaintiffs' individual claims.

Respondents protest that "[i]t is always the case that an otherwise 'final' judgment may be unwound by a successful appeal." Resp. Br. 23. Not so. This Court has never held that an appellate court has jurisdiction under Section 1291 to review a dismissal order where, as here, plaintiffs challenge only a procedural order *having nothing to do with the merits of their claims* while insisting upon "the right to . . . revive their claims should they prevail on appeal," Resp. Br. 45; *accord id.* at 15, 30 n.17.

The only case respondents offer in defense of such a proposition is *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958).[1] They describe that case as holding that a plaintiff may "appeal a prior adverse ruling that would otherwise be interlocutory" whenever it chooses to consent to entry of judgment against it. Resp. Br. 24. But respondents ignore the Court's critical qualification of its holding: "When the Government proposed dismissal for failure to obey, *it had lost on the merits* and was only seeking an expeditious review." 356 U.S. at 680-81 (emphasis added). The Court found nothing conditional about the dismissal in *Procter & Gamble*; according to the Court, the dismissal merely memorialized the district court's prior elimination of the Government's claims "on the merits."[2]

---

[1] Respondents also repeatedly cite *Abney v. United States*, 431 U.S. 651 (1977). But that case merely holds that an order rejecting a double jeopardy claim satisfies the "collateral order" doctrine.

[2] Later in their brief, respondents fight the premise of *Procter & Gamble*, asserting it was "surely untrue" as a factual matter that the prior order affected the merits. Resp. Br. 49. But this Court expressly found otherwise, and its statement that the government "had lost on the merits," 356 U.S. at 680-81, formed the basis for the Court's decision.

Respondents also suggest this Court more recently "implicitly recognized" that appellate jurisdiction lies when a plaintiff voluntary dismisses a claim in response to a pretrial order limiting the remedies on that claim, simply because this Court decided a case in that procedural posture. Resp. Br. 50 (citing *Gabelli v. SEC*, 133 S. Ct. 1216 (2013)). But it is settled that "drive by jurisdictional rulings"—that is, assertions of this Court's jurisdiction without any reasoning—"should be accorded no precedential effect." *Arbaugh v. Y&H Corp.*, 546 U.S. 500,

Implicitly confronting the real holding of *Procter & Gamble*, respondents alternatively assert the district court's order striking their class allegations left them "with diminished rights that (as a matter of law and fact) were not the same rights asserted in the complaint." Resp. Br. 45 n.29. Put another way, respondents maintain that the class certification denial affects the merits of their claims because it left respondents with only an "*impaired* version" of their individual claims, not their "*original* claims." *Id.*; *accord id.* at 44, 49 n.33.

But this Court has explained time and again that an order denying class certification "d[oes] *not* affect the merits" of the named plaintiff's own claim. *Gardner v. Westinghouse Broad. Co.*, 437 U.S. 478, 480-81 (1978) (emphasis added); *see also id.* at 482 (denial of class certification "in no way touch[es] the merits of the claim but only relate[s] to pretrial procedures") (quoting *Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966)); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 n.11 (1983) (class certification denial has "no *legal* effect on the named plaintiff's ability to proceed with his individual claim"); *United Airlines v. McDonald*, 432 U.S. 385, 390-91 & n.4 (1977) (same). That being so, a voluntary dismissal following class certification denial cannot create a final decision where, as here, plaintiffs insist they

---

511 (2006) (internal quotation marks and citation omitted). And besides, the Solicitor General explained that an alternate basis for jurisdiction existed in *Gabelli*. Br. of SEC at 7 n.3, *Gabelli v. SEC*, No. 11-1274. The Court therefore had no reason to discuss appellate jurisdiction.

may resume pursuing their dismissed claims in the event of a reversal of the procedural class certification ruling.

As Microsoft has explained, what respondents really want is for this Court to create a procedure akin to the conditional plea authorized by Fed. R. Crim. P. 11(a)(2). *See* Petr. Br. 20. Respondents suggest in a footnote that conditionally pleading guilty is somehow different from conditionally dismissing a civil lawsuit. Resp. Br. 29-30 n.17. But as they must acknowledge, both actions end a case *unless* "a party reserves the right to press [its case] if an adverse order is overturned." *Id.* That acknowledgment is fatal, for there is no civil counterpart to Criminal Rule 11(a)(2)—and if respondents' view of Section 1291 were correct, there would have been no need for that rule on the criminal side.

In short, plaintiffs cannot "convert an interlocutory order" having nothing to do with the merits of their claims into a final decision by dismissing their claims while reserving the ability to pursue the claims in the event of a successful appeal of the interlocutory procedural order. *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 245 (3d Cir. 2013). "If the possibility of finality alone establishes finality, the word has no meaning, and § 1291 serves little purpose." *Page Plus*, 733 F.3d at 662.

2. Respondents also defend their voluntary dismissal tactic by offering arguments grounded in supposedly pragmatic considerations. But respondents do little more than catalog the

arguments the plaintiffs in *Livesay* unsuccessfully advanced in support of the death knell doctrine.

First, respondents contend that if plaintiffs with small individual claims have no right to appeal, "parties with legitimate claims who (as a class) have suffered significant aggregate harm will simply throw in the towel and walk away." Resp. Br. at 20. The plaintiffs made exactly this argument in *Livesay*, explaining that, absent immediate review, "they would not pursue their claims individually." 437 U.S. at 466. But the Court unanimously deemed this a necessary cost of preserving "the judicial system's overall capacity to administer justice" through "maintaining the appropriate relationship between" trial and appellate courts. *Id.* at 473, 476 (citation omitted); *see also* Petr. Br. 17-18. This Court reaffirmed that choice when promulgating Rule 23(f), allowing appellate courts to consider whether plaintiffs face a death knell situation but refusing to create an appeal as of right in that circumstance. *See* Petr. Br. 31-33.

Besides, respondents ignore that plaintiffs sometimes exaggerate their supposed inability to continue litigating absent class certification—for example, where, as here, prevailing parties may recover attorneys' fees and penalties. *See* Petr. Br. 26-27; J.A. 75 (requesting fees). The Court, therefore, should take respondents' economic arguments with a grain of salt. *See* Pet. for Cert. at 23, *Milberg LLC v. Bobbitt*, *cert. pending*, No. 15-734.

Second, respondents assert that "an appeal from a voluntary dismissal will give adequate notice to all sides of the true scope of the controversy," allowing both sides "to calibrate their efforts to the true

amount at stake." Resp. Br. 20. Once again, the plaintiffs in *Livesay* made the same argument. The Court rejected it, explaining that while immediate appellate review might *sometimes* clarify the stakes in putative class actions, it often would not, leaving the parties in much the same position as before the appeal. 437 U.S. at 474.

This case exemplifies the point. Far from giving "notice to all sides of the true scope of the controversy," Resp. Br. 20, the Ninth Circuit "express[ed] no opinion" on whether the case should proceed as an individual or class action. Pet App. 19a. The parties still have no idea how much is at stake and would not be likely to find out for years—potentially after multiple trips to the court of appeals. And this protracted uncertainty is typical. When plaintiffs secure interlocutory review and reversals of class certification denials, appellate courts commonly remand for further class certification proceedings, without resolving the scope of the case.[3]

Third, respondents repeatedly stress they made "a risky choice" in voluntarily dismissing their claims, in that they "had to stake their entire case on the outcome of an appeal." Resp. Br. 15, 18; *accord id.* at 37. But plaintiffs who invoked the death knell doctrine took the same step. A prerequisite for

---

[3] *See, e.g., Reyes v. NetDeposit, LLC*, 802 F.3d 469, 487-88, 494 (3d Cir. 2015); *Madden v. Midland Funding, LLC*, 786 F.3d 246, 255 (2d Cir. 2015); *In re IKO Roofing Shingle Prods. Liab. Litig.*, 757 F.3d 599, 604 (7th Cir. 2014); *see also Edwards v. First Am. Corp.*, 798 F.3d 1172, 1181-82 (9th Cir. 2015) (vacating and remanding for a second time).

invoking the death knell doctrine was to show that, absent class certification, the plaintiffs "would not pursue their claims individually." *Livesay*, 437 U.S. at 466; *see also id.* at 473 ("[T]he named plaintiff is required to prove that no member of the purported class has a claim that warrants individual litigation."). So once plaintiffs invoked the death knell doctrine, they were estopped from any further litigation on the individual claims absent a renewed opportunity to represent a class. Petr. Br. 21-22.

Respondents dispute this parallelism between the voluntary dismissal tactic and the death knell doctrine. They note *Livesay* never mentioned estoppel and suggest the judicial estoppel doctrine did not even exist in 1978. Resp. 30-31. But *Livesay*'s silence regarding estoppel proves nothing; the Court took it as a given that plaintiffs who invoked the death knell doctrine would not resume litigating individually if their appeals proved unsuccessful. *See* 437 U.S. at 466, 469-70. And if anyone had suggested otherwise, this Court, long before 1978, "laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *Davis v. Wakelee*, 156 U.S. 680, 689 (1895).

That leaves respondents' assertion that "lower courts" nevertheless "permitted some 'death knell' appeals even where plaintiffs *would continue litigating their individual claims.*" Resp. 30. Respondents cite nothing for this assertion, and Microsoft knows of no authority supporting it. This is not surprising. If any plaintiff during the death

knell era had the audacity to pursue his individual claim after persuading the district judge that the denial of class certification made further litigation impossible, judicial estoppel would have been the least of plaintiff's (and his lawyer's) troubles.

Fourth and finally, respondents trumpet the desirability of the class action device "where claims have only minimal value," arguing there is "an obvious interest in reading Section 1291 to . . . preserve the practical ability of litigants to assert their rights." Resp. Br. 42. This is nothing new either. The plaintiffs in *Livesay* devoted much of their brief to arguing that "the small-claim class action . . . serves a vital public interest." 437 U.S. at 470. Yet this Court deemed that argument "irrelevant." *Id.* The jurisdictional rules governing appellate litigation do not turn on "[s]uch policy arguments." *Id.* It is for Congress and the rulemaking process, not this Court in the context of litigation, to determine whether particular types of lawsuits warrant an exception from the usual finality requirements. *See id.*

3. Despite the practical equivalence between the voluntary dismissal tactic and the death knell doctrine, respondents insist that their new tactic "implicates none of *Livesay*'s core concerns." Resp. Br. 28. In fact, the voluntary dismissal tactic threatens precisely the same dysfunction as the death knell doctrine.

a. The *Livesay* Court rejected the death knell doctrine partly because it would have increased the likelihood that courts would "waste [] judicial resources" in complex class actions. 437 U.S. at 473. Respondents contend no such threat exists here

because a voluntary dismissal ensures the case will end unless "the voluntary-dismissal plaintiff wins" on appeal. Resp. Br. 38-39. But, as explained above, exactly the same was true under the death knell doctrine. *See supra* at 9-11. Yet this Court correctly perceived that "the potential for multiple appeals in every complex case [was] apparent and serious," disrupting the balance between trial and appellate courts. *Livesay*, 437 U.S. at 474. So too here. *See supra* at 9.

Even if the bet-the-case dynamic respondents describe were more pronounced in a voluntary dismissal regime, it would not matter. Respondents assert "[f]ew parties with legitimate claims will risk their entire case on [appeal from the denial of class certification] unless it is truly devastating to their lawsuit." Resp. Br. 19. But while plaintiffs with "legitimate" claims may indeed pause before staking "*everything* on the outcome of an appeal" (especially when armed with a fee-shifting regime), *id.*, the same cannot be said of plaintiffs with weak claims. For those plaintiffs, the threat of class certification is the best—often the only—leverage they have over defendants. Those plaintiffs will almost always prefer to litigate class certification issues instead of the merits, no matter how much delay it causes. *See* Petr. Br. 25-26. Meanwhile, appellate courts will be forced to expend significant resources sorting through intricate procedural issues that would disappear if

plaintiffs had to try proving their claims on the merits.[4]

Affording plaintiffs this tactical weapon would implicate *Livesay*'s related concern that the death knell doctrine "operate[d] only in favor of plaintiffs even though the class action issue . . . will often be of critical importance to defendants as well." 437 U.S. at 476. Respondents say the voluntary dismissal tactic "will also benefit defendants, who should value certainty about the class issue just as much as plaintiffs." Resp. Br. 43. But this misses the point. This Court's concern in *Livesay* was that the death

---

[4] This case illustrates the problem. This case is now entering its sixth year (its tenth year, if one counts the predecessor litigation by the same lawyers for the same putative class), and respondents have never tested their claims on the merits. Instead, they restrict themselves to misleading renditions of the "facts." Respondents, for instance, claim the Xbox 360 console scratched discs "when subject even to the smallest of movements." Resp. Br. 12. But their own expert conceded that he had to tilt a console quickly by 30 degrees to induce a scratch. D. Ct. Dkt. 24, Ex. J ¶ 38. Respondents also tout that Microsoft received "approximately 55,000 complaints about scratched discs," Resp. Br. 12, but omit to mention that only 28,000 people—"0.4% of Xbox users" Pet. App. 6a—accounted for these calls, and many callers reported scratched-disc issues other than alleged here. Contrary to respondents' suggestion (Resp. Br. 14), these factual deficiencies are not due to a lack of discovery. The same lawyers who represent respondents represented the plaintiffs in the prior case involving the same allegations, and they conducted *16 months* of discovery, including fact and expert depositions. Petr. Br. 6. For that reason, the parties stipulated here to litigate class certification on the basis of the prior, comprehensive record. D. Ct. Dkt. 50 ¶ 5.

knell doctrine gave plaintiffs a path to appellate review whose equivalent was off-limits to defendants. That is, if a district court *granted* class certification so as to render it "economically prudent to settle and to abandon a meritorious defense," defendants had no means of immediate appellate review. *See Livesay*, 476 U.S. at 476. Likewise here, no matter how misguided defendants perceive an order granting class certification to be, they cannot compel review by simply filing a document conditionally disposing of the case—as respondents say they have done.

Finally, *Livesay* rejected the death knell doctrine because "it would apply equally to the many interlocutory orders in ordinary litigation—rulings on discovery, on venue, on summary judgment—that may have such tactical economic significance that a defeat is tantamount to a 'death knell' for the entire case." 437 U.S. at 470. Respondents try to reassure the Court that plaintiffs would deploy the voluntary dismissal tactic only following "critical" pretrial orders that are "truly devastating to their lawsuit[s]." Resp. Br. 2, 19. But the translation of this assertion is that the voluntary dismissal tactic, just like the death knell doctrine, would apply equally to any pretrial order in ordinary litigation that a plaintiff deems sufficiently damaging to his case.

b. All told, the *only* difference between the voluntary dismissal tactic and the death knell doctrine is that respondents' new tactic avoids the judicial fact-finding that preceded application of the death knell doctrine. Under respondents' tactic, plaintiffs would not have to *prove* that their claims are economically untenable absent class certification. Resp. Br. 27. They would simply stipulate (in the

form of a conditional dismissal) that they would not continue to pursue their individual claims absent a renewed possibility of class certification.

The *Livesay* Court did criticize the potentially burdensome fact-finding necessary to administer the death knell doctrine. *See* 437 U.S. at 473-74. But given the many legal and practical concerns this Court expressed regarding the death knell doctrine, it verges on the absurd to suggest the Court thought the solution was for plaintiffs simply to *stipulate* that they would not pursue their individual claims absent class certification, without requiring district courts to make a finding.

Indeed, even respondents' stipulation procedure would be a double-edged sword. Whatever benefits the procedure might offer would be more than offset by the costs of putting the keys to appellate review of class certification denials exclusively in plaintiffs' hands. Spared the obligation to "prove" to judges that a case is untenable absent class certification, *Livesay*, 437 U.S. at 473, plaintiffs could force immediate appellate review of orders denying class certification much more frequently than under the death knell doctrine. This would increase the caseload of appellate courts and place enhanced "pressure on the defendant[s] to settle even unmeritorious claims," *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting)—if only to avoid the financial expense and delay of such appeals. This is not a recipe for "achieving a healthy legal system," *Cobbledick v. United States*, 309 U.S. 323, 326 (1940).

B. The Voluntary Dismissal Tactic Would Upend Fed. R. Civ. P. 23(f).

Faced with a rule of civil procedure tailored to the situation respondents claim to face—Rule 23(f)—respondents try to marginalize the "particular solicitude" this Court has expressed for the rulemaking process to the arena of interlocutory appeals. Resp. Br. 43. Respondents also suggest the committee that drafted Rule 23(f) condoned the voluntary dismissal tactic. Resp. Br. 33-34. None of this is correct.

For starters, this Court's preference for rulemaking over judicial decision making covers not just concededly interlocutory appeals but also controversies over "when a ruling of a district court is final for purposes of appeal under section 1291." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 113-14 (2009) (quoting 28 U.S.C. § 2072(c)); *accord Swint v. Chambers County Comm'n*, 514 U.S. 35, 48 (1995). This case, therefore, falls squarely within the class of procedural disputes where a rule addressing the situation has "special force." *Mohawk*, 558 U.S. at 113.

Furthermore, the drafters of Rule 23(f) did not approve the voluntary dismissal tactic. Respondents cite one footnote in a 200-page report given to the committee two years before Rule 23(f)'s promulgation, in which the authors noted the Second Circuit had tolerated the voluntary dismissal tactic. Resp. Br. 34 (citing Thomas E. Willging, et al., *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* 80 n.310 (Fed. Judicial Ctr. 1996)). But even that footnote is telling. It cites

Livesay for the proposition that "[u]nder the final judgment rule," orders denying class certification are "not appealable until the entry of a final judgment" absent "interlocutory appeal under the limited exceptions of 28 U.S.C. § 1292(a) and (b)." Willging, *supra*, at 80 & n.310. The footnote contains only a "but see" reference to the Second Circuit's decision in *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176 (2d Cir. 1990). Thus, far from endorsing the voluntary dismissal tactic, this report indicates the Second Circuit's tolerance for it is inconsistent with *Livesay*.

Lest there be any doubt as to what the advisory committee itself thought, its notes to Rule 23(f) state that "[a]n order denying certification may confront the plaintiff with a situation in which the *only sure path* to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the cost of litigation." Fed. R. Civ. P. 23(f) advisory committee's notes to 1998 amendment (emphasis added). The committee assumed, in other words, that even plaintiffs in true death knell situations could not force appellate review without litigating their claims to conclusion on the merits.

Against this backdrop, the committee could have responded by proposing a class-action-specific counterpart to Criminal Rule 11(a)(2). It did not. Instead, the committee decided the fairest and most administratively sensible approach was to create a system of *discretionary* review. *See* Br. of Civil Procedure Scholars 11-14. This Court promulgated the proposal as Rule 23(f). The existence of that carefully considered rule counsels against

sanctioning a tactic calculated to circumvent it. *See Swint*, 514 U.S. at 48.

II. If Respondents Could Not Resume Litigating Their Individual Claims, This Case Is Moot.

Given the absence of any rule or precedent allowing plaintiffs to dismiss claims *conditionally* to facilitate a civil appeal, this Court may conclude that respondents unequivocally and forever abandoned their claims when they dismissed them with prejudice. *See, e.g., Deakins v. Monaghan*, 484 U.S. 193, 200 & n.4 (1988) (dismissal at plaintiffs' request "prevented [them] from reviving their claims"). In that event, nothing about respondents' individual claims or their putative relationship to the class they wished to represent prevents this case from being moot.

A. Individual Claims

Respondents first contend this case cannot be moot because they "reserv[ed] the right" to resume pressing their individual claims "should they prevail on appeal." Resp. Br. 44-45; *see also id.* at 46 n.29. But even setting aside the fact that their dismissal contains no such reservation, *see* Pet. App. 36a, respondents' contention just assumes away the premise of the mootness problem. Microsoft's argument is in the alternative: either a reversal on class certification brings respondents' dismissed claims back to life, in which case (for the reasons explained above) there is no final judgment, *or* a reversal would not bring these claims back to life, in which case this lawsuit is moot. Respondents' discussion of their supposed reservation of rights is

therefore irrelevant to Microsoft's mootness argument. Microsoft does not argue that respondents *waived* some right to have their claims reinstated after a successful appeal on class certification. Instead, Microsoft's mootness argument assumes respondents have no reinstatement right at all. And litigants cannot waive, much less reserve, rights they do not have in the first place.

Respondents also maintain that even if their individual claims cannot be revived after a successful appeal, their stake in those claims precludes this lawsuit from being moot because the final judgment here "was entered *with* prejudice"—in contrast to the dismissals without prejudice that gave rise to common law cases precluding plaintiffs from appealing after dismissing their claims. Resp. Br. 48 (emphasis in original); *see also* Petr. Br. 35-36 (discussing common law cases). This argument is puzzling. That the order here dismissed respondents' claims with (instead of without) prejudice only makes this case *more* clearly moot.

Perhaps respondents mean to suggest that common law cases refusing to find appellate jurisdiction after voluntary nonsuits are not Article III cases at all, but instead rest on a perceived lack of finality. If so, respondents are wrong. These appellate courts deemed a voluntary nonsuit to be "a *final* determination of the action." *Kelly v. Great Atl. & Pac. Tea Co.*, 86 F.2d 296, 297 (4th Cir. 1936) (emphasis added). But because such orders were "entered at the request of the plaintiff," these courts held he "may not, after causing it to be entered, complain of it on appeal." *Id.* That reasoning

bespeaks the lack of an adverse judgment—that is, the lack of a case or controversy.

Moreover, courts in the modern era addressing voluntary dismissals with prejudice have expressly invoked Article III as the basis for dismissing appeals. *See* Petr. Br. 36 (discussing these cases). Respondents offer no response to these cases.

B. Claims Related To The Putative Class

Respondents alternatively argue this lawsuit is not moot because (1) respondents might recover an "incentive award" for bringing this case on behalf of a class, Resp. Br. 53-55; and (2) respondents have a continuing interest in representing the proposed class, *id.* at 55-57. As Microsoft has noted, respondents forfeited these arguments. *See* Petr. Br. 39. They had every opportunity to argue to the Ninth Circuit and in their Brief in Opposition that their putative relationship to the proposed class created appellate jurisdiction. They never did. It is too late to refashion their appeal. *Id.*

In any event, respondents' arguments lack merit.

1. If respondents' claims are "gone and beyond revival," Resp. Br. 57, they have no continuing interest in obtaining any incentive award. According to case law from the lower courts, named plaintiffs may recover incentive awards—just as they may recover attorneys' fees and costs—when they settle their claims and secure benefits for a class. *See, e.g.*, *Berry v. Schulman*, 807 F.3d 600, 613-14 (4th Cir. 2015); *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 715-16 (7th Cir. 2015); *Staton v. Boeing Co.*, 327 F.3d 938, 976-78 (9th Cir. 2003); *see also* Petr. Br. 40 (same rule for attorneys' fees and costs). But

respondents cite no cases—and Microsoft knows of none—holding that plaintiffs who *lose and therefore recover nothing* on their own claims may recover an incentive award. The reason is simple. Incentive awards reward "a *successful* [c]lass action plaintiff" for the special burden of "becoming *and continuing* as a litigant" through settlement. *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 200 (S.D.N.Y. 1997) (emphasis added); *see also Shane Group, Inc. v. Blue Cross Blue Shield*, ___ F.3d ___, 2016 WL 3163073, at*8 (6th Cir. June 7, 2016) (requiring plaintiffs seeking incentive award to supply "specific documentation—in the manner of attorney time sheets—of the time actually spent on the case by each recipient of an award"). Where named plaintiffs abandon their claims, they do not achieve success or even bear the burden of litigating on behalf of others.[5]

2. Respondents' purported continuing interest in pursuing relief for the proposed class fares no better. In a world in which abandoned claims cannot be revived, respondents never say how they might continue, after abandoning their own claims, to serve as proper class representatives. *See* Fed. R. Civ. P. 23(a)(3) & (4) (class representative's claims must be "typical of the claims . . . of the class"; representative must "fairly and adequately protect the interests of the class"). But even if respondents could overcome

---

[5] Respondents' suggestion that they might qualify for an incentive award on the facts of *this* case is particularly unfounded. Respondents dismissed their claims before any discovery even occurred. *See* Resp. Br. 14. They have incurred no litigation burdens whatsoever, and will incur none if their claims are gone and beyond revival.

this obstacle, it would not matter. As their own amicus recognizes, the rule of *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), and *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), applies only to situations in which "the named plaintiffs' claims were resolved against their will, either though defendants' actions, or through the passage of time." Amicus Br. of Public Justice 16.[6] Absent such events beyond the plaintiffs' control, no "jurisdictional gap" arises that requires application of the equitable doctrine under which certain legal rulings "relate back" to an earlier date. *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1536 (2013) (Kagan, J., dissenting). That being so, Microsoft agrees with Public Justice that this Court can "reverse . . . without calling the rule articulated in *Roper* and *Geraghty* into question." Amicus Br. of Public Justice 16; *see also id.* 3.

CONCLUSION

For these reasons, the Court should reverse and remand with instructions to dismiss the appeal.

---

[6] Respondents cite one D.C. Circuit case applying *Roper* and *Geraghty* where the named plaintiffs settled their claims while reserving the ability to spread their attorneys' fees and costs to the rest of the class. Resp. Br. 55 (citing *Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 529 (D.C. Cir. 2006)). But even if this holding is correct, respondents implicitly disclaim any continuing interest in spreading attorneys' fees or costs, *see* Resp. Br. 55—and, as explained above, they lack any right to seek an incentive award.

Respectfully submitted,

Bradford L. Smith
David M. Howard
Timothy G. Fielden
Microsoft Corporation
One Microsoft Way
Redmond, WA 98052

Charles B. Casper
Montgomery, McCracken
Walker & Rhoads, LLP
123 South Broad Street
Philadelphia, PA 19109

Jeffrey L. Fisher
559 Nathan Abbott Way
Stanford, CA 94305

Stephen M. Rummage
Counsel of Record
Fred B. Burnside
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101
(206) 622-3150
steverummage@dwt.com

June 15, 2016

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
MAR 18 2016
OFFICE OF THE CLERK

No. 15-457

IN THE
Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

v.

SETH BAKER, ET AL.,

Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN TORT REFORM ASSOCIATION, AND THE RETAIL LITIGATION CENTER, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Kate Comerford Todd
Warren Postman
U.S. CHAMBER LITIGATION CENTER
1615 H. St. NW
Washington, DC 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

Mark W. Mosier
Counsel of Record
Michael M. Maya
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20004-2401
mmosier@cov.com
(202) 662-6000

Counsel for Amici Curiae

(Additional Counsel Information on Inside Cover)

H. Sherman Joyce
Lauren Sheets Jarrell
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, NW, Suite 400
Washington, DC 20036
(202) 682-1168

Counsel for American Tort Reform Association

Deborah R. White
RETAIL LITIGATION CENTER, INC.
1700 N. Moore Street
Suite 2250
Arlington, VA 22209
(703) 600-2067

Counsel for Retail Litigation Center, Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. The Ninth Circuit's Voluntary Dismissal Rule Cannot Satisfy the Requirements of Either Article III or Section 1291. 6

A. Plaintiffs' Dismissal With Prejudice Moots Their Appeal 7

B. Section 1291's Finality Requirement Is Not Satisfied If Plaintiffs May Revive Their Claims. 11

II. The Ninth Circuit's Voluntary Dismissal Rule Wastes Judicial Resources and Distorts Class Action Practice. 14

A. The Ninth Circuit's Voluntary Dismissal Rule Suffers from the Same Flaws as the Death Knell Doctrine. 14

B. The Ninth Circuit's Rule Upsets the Balance Struck by Federal Rule of Civil Procedure 23(f). 18

III. The Ninth Circuit's Voluntary Dismissal Rule Cannot Be Saved By Allowing Plaintiffs To Pursue Appeal After a Permanent Dismissal of Their Claims. 22

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Elec. Power Co. v. Connecticut,
131 S. Ct. 2527 (2011) 2

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 8

AT&T Mobility LLC v. Concepcion,
131 S. Ct. 1740 (2011) 17

Blair v. Equifax Check Servs., Inc.,
181 F.3d 832 (7th Cir. 1999) 20

Camesi v. Univ. of Pitt. Med. Ctr.,
729 F.3d 239 (3d Cir. 2013)..... 7, 8, 10, 16

Chamberlan v. Ford Motor Co.,
402 F.3d 952 (9th Cir. 2005) 19

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) .....*passim*

Deakins v. Monaghan,
484 U.S. 193 (1988) 8

Deposit Guar. Nat'l Bank v. Roper,
445 U.S. 326 (1980) 10

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974) 12

Fairley v. Andrews,
578 F.3d 518 (7th Cir. 2009) 7

Gardner v. Westinghouse Broad. Co,
437 U.S. 478 (1978) 10

Moses H. Cone Mem. Hosp. v. Mercury Const., 460 U.S. 1 (1983) 9

Nashville, Chattanooga & St. Louis Ry. v. United States, 113 U.S. 261 (1885) 7

O'Shea v. Littleton,
414 U.S. 488 (1974) 10

Page Plus of Atlanta, Inc. v. Owl Wireless, LLC, 733 F.3d 658 (6th Cir. 2013) 8

Rhodes v. E.I. du Pont de Nemours & Co., 636 F.3d 88 (4th Cir. 2011) 10

Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001) 9

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010) 17

Summers v. Earth Island Inst.,
555 U.S. 488 (2009) 7, 10

United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980) 11, 24

United States v. Procter & Gamble Co.,
356 U.S. 677 (1958) 7, 8, 9

Williamson v. Mazda Motor of Am., Inc.,
131 S. Ct. 1131 (2011) 2

Woodard v. STR Corp.,
170 F.3d 1043 (11th Cir. 1999) 7

Statute and Rule

28 U.S.C. § 1291 ..... *passim*

Fed. R. Civ. P. 23(f) ..... *passim*

Other Authorities

William P. Barnette, *The Limits of Consent: Voluntary Dismissals, Appeals of Class Certification Denials, and Some Article III Problems*, 56 S. Tex. L. Rev. 451 (2015) 7

John Beisner et al., *Study Reveals US Courts of Appeals Are Less Receptive to Reviewing Class Certification Rulings* (Apr. 29, 2014) 21

John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370, 371 (2000) 24

INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.[1] A central function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts, including this Court. To that end, the Chamber regularly files amicus briefs in cases that raise issues of vital concern to the nation's business community, including in cases involving important issues of class action practice and procedure. *See, e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146 (filed Aug. 14, 2015); *Campbell-Ewald Co. v. Gomez*, No. 14-857 (filed July 23, 2015); *Spokeo, Inc. v. Robins*, No. 13-1339 (filed July 9, 2015).

The American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring

---

[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored the brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than the *amici*, their counsel, or their members made such a monetary contribution. The parties' consents to the filing of this brief are on file with the Clerk's office.

fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed amicus curiae briefs in cases before this Court and other federal and state courts addressing issues of importance to its members. *See, e.g.*, *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011); *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131 (2011).

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and engages in legal proceedings that affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

Businesses are regularly named as defendants in class actions. The Chamber, ATRA, and RLC, as well as their members, have a strong interest in ensuring that the courts correctly apply the federal law governing appeals of class certification decisions. By failing to do that here, the Ninth Circuit has allowed class-action plaintiffs to take immediate appeals of orders denying class certification even in cases where the requirements for interlocutory appeal under Federal Rule of Civil Procedure 23(f) have not been met. That rule upsets the balance struck by Rule 23(f), allows prolonged litigation of unwarranted class action lawsuits, and harms *amici*'s members.

INTRODUCTION AND SUMMARY OF ARGUMENT

Federal law expressly provides a method for parties to seek immediate appellate review of a class certification order. *See* Fed. R. Civ. P. 23(f). Under Rule 23(f), a party can petition for interlocutory review of the order, and the court of appeals has discretion to take the appeal and review the class certification order prior to final judgment. *Id.* Importantly, Rule 23(f) applies to orders both granting and denying class certification, and thus the rule makes appellate review available on the same terms to both plaintiffs and defendants.

The Ninth Circuit provides plaintiffs in a putative class action with an additional method for obtaining immediate appellate review of an order denying class certification.[2] Under the Ninth Circuit's voluntary dismissal rule, a plaintiff may forgo litigating her claims on the merits and take an immediate appeal of an order denying class certification by voluntarily dismissing the claims with prejudice and then appealing under 28 U.S.C. § 1291. Unlike an appeal under Rule 23(f), the court of appeals has no discretion to decline jurisdiction over the appeal. And because this tactic depends on dismissing the claims—something a defendant cannot do—this method for obtaining immediate appellate review is available only to plaintiffs.

---

[2] As this case demonstrates, the Ninth Circuit applies the same rule when the court grants a defendant's motion to strike class allegations from the complaint. Pet. App. 12a.

This is not the first time that a court of appeals has allowed plaintiffs to appeal an order denying class certification as a final decision under Section 1291. In the 1970s, several courts of appeals adopted the "death knell" doctrine, which treated a class certification denial as a final decision whenever the order made it "economically imprudent" for the plaintiff to litigate his individual claims. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978). In rejecting the death knell doctrine, this Court noted that the doctrine wasted judicial resources by encouraging piecemeal appeals, and that it unfairly disadvantaged defendants, who had no similar right to an immediate appeal of orders granting class certification. *Id.* at 470-74. The Ninth Circuit's voluntary dismissal rule not only suffers from the same policy flaws as the death knell doctrine, but also ignores basic principles of appellate jurisdiction.

I. When a plaintiff dismisses her claims with prejudice, there is no longer a live "case or controversy," as required by Article III of the U.S. Constitution. A plaintiff who dismisses her own claims with prejudice has no right to challenge that dismissal on appeal and therefore has no further personal stake in the outcome of the litigation. Applying this black-letter law, Plaintiffs' dismissal of their own claims with prejudice in this case should have deprived the Ninth Circuit of jurisdiction to decide Plaintiffs' appeal.

Plaintiffs contend that they can dismiss their claims "with prejudice" but then later "revive" those claims on remand if they prevail on appeal. Br. in Opp. 16 n.4. In other words, Plaintiffs do not *really*

want to dismiss their claims with prejudice; rather, they wish to *conditionally* dismiss their claims pending appeal. Even if that procedural option existed under the Federal Rules of Civil Procedure—and it does not—appellate jurisdiction would still be lacking because the order dismissing their claims would not be sufficiently final to support jurisdiction under Section 1291.

II. The Ninth Circuit's voluntary dismissal rule not only violates basic principles of appellate jurisdiction, it also reflects a harmful judicial policy. The rule will waste judicial resources by permitting piecemeal appeals that the courts of appeals have no discretion to decline to hear, and it unfairly disadvantages defendants because it authorizes immediate appeals only for plaintiffs. These are precisely the problems that the Court sought to avoid in *Livesay* when it rejected the death knell doctrine, and there is no reason why they should be tolerated here. The Ninth Circuit's rule also undermines Rule 23(f), which permits both plaintiffs and defendants to seek interlocutory appeals of class certification rulings, while also providing courts of appeals with the discretion to decline to hear those appeals.

III. An alternative rule under which a named plaintiff is allowed to represent a class even if her own claims are permanently extinguished would also be problematic. This rule would invite the same problems as the Ninth Circuit's voluntary dismissal rule: it would waste judicial resources by encouraging piecemeal appeals and it would benefit only plaintiffs. The rule would also create pressure for named plaintiffs to forfeit potentially meritorious

claims for the benefit of a putative class and for class counsel to encourage their clients to dismiss their individual claims even when doing so is not in their clients' best interest.

ARGUMENT

I. The Ninth Circuit's Voluntary Dismissal Rule Cannot Satisfy the Requirements of Either Article III or Section 1291.

The Ninth Circuit's decision leaves open the question of what happens to Plaintiffs' individual claims on remand. Can Plaintiffs withdraw their voluntary dismissal and resume litigating their individual claims on the merits? Or are Plaintiffs' claims lost forever? The court of appeals suggested that Plaintiffs could resume litigating the claims that they voluntarily dismissed with prejudice, Pet App. 19a, and Plaintiffs have taken the position that their claims will be "revived." Br. in Opp. 16 n.4.

This question is important, but not because it determines whether the Ninth Circuit had jurisdiction to hear the appeal. Regardless of what would happen on remand, the court lacked appellate jurisdiction. Rather, the question is important because it determines *why* the court lacked jurisdiction. If Plaintiffs cannot revive their claims on remand, then the appeal does not present a live "case or controversy," as required by Article III. If Plaintiffs can revive their claims, then the order dismissing their claims was not sufficiently final to support jurisdiction under Section 1291. Either way, appellate jurisdiction was lacking, and the appeal should have been dismissed.

A. Plaintiffs' Dismissal With Prejudice Moots Their Appeal.

When a plaintiff voluntarily dismisses her claims with prejudice, those claims are, by definition, permanently extinguished at the plaintiff's request. Claims that are "dismissed with prejudice are gone forever." *Camesi v. Univ. of Pitt. Med. Ctr.*, 729 F.3d 239, 247-48 (3d Cir. 2013); *see also Fairley v. Andrews*, 578 F.3d 518, 521-22 (7th Cir. 2009) (claims dismissed with prejudice are "lost forever").

A plaintiff cannot appeal the voluntary dismissal of her own claims because "[l]itigants aren't aggrieved when the judge does what they want." *Fairley*, 578 F.3d at 521 (citing *Nashville, Chattanooga & St. Louis Ry. v. United States*, 113 U.S. 261 (1885)); *Woodard v. STR Corp.*, 170 F.3d 1043, 1044 (11th Cir. 1999) (judgment obtained "at the request of the plaintiff" was "not appealable" because there was "no 'case or controversy' in regard to it"); *see also* William P. Barnette, *The Limits of Consent: Voluntary Dismissals, Appeals of Class Certification Denials, and Some Article III Problems*, 56 S. Tex. L. Rev. 451, 459 (2015) ("Limits of Consent") ("Perhaps the most prominent, traditional example of the lack of concrete adverseness is when a plaintiff voluntarily dismisses her complaint.") (quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 680 (1958)).

To satisfy Article III's "case or controversy" requirement, a plaintiff must have "a personal stake in the outcome of the controversy." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (internal quotation marks and citation omitted). The plaintiff's

"direct stake in the outcome" must continue throughout the litigation, including when the case is on appeal. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) (internal quotation marks and citation omitted).

Applying these principles, this Court has repeatedly concluded that a plaintiff who has voluntarily dismissed her claims may not appeal the dismissal of those claims. *See, e.g., Procter & Gamble Co.*, 356 U.S. at 680 (noting the "the familiar rule that a plaintiff who has voluntarily dismissed his complaint may not sue out a writ of error"); *Deakins v. Monaghan*, 484 U.S. 193, 199-200 (1988) (voluntarily dismissed claims are "moot").

Likewise, numerous courts of appeals have rejected the argument that a plaintiff can dismiss claims "with prejudice" and yet retain the right to revive those claims later in the litigation. As the Third Circuit explained, this argument "reflects a fundamental misunderstanding of the nature of a dismissal with prejudice." *Camesi*, 729 F.3d at 247; *see also Page Plus of Atlanta, Inc. v. Owl Wireless, LLC*, 733 F.3d 658, 662 (6th Cir. 2013) ("If the possibility of finality alone establishes finality, the word has no meaning and § 1291 serves little purpose.").

These courts of appeals have correctly refused to allow plaintiffs to revive claims that were dismissed with prejudice because doing so ignores the distinction between "with prejudice" and "without prejudice" dismissals. As discussed above, claims dismissed *with* prejudice are "gone forever." *Camesi*, 729 F.3d at 247. In contrast, claims dismissed *with-*

out prejudice may be revived. *See, e.g.*, *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001) (dismissal without prejudice does not "bar[] the plaintiff from returning later, to the same court, with the same underlying claim").

As a result, if Plaintiffs' claims were truly dismissed with prejudice, then a live "case or controversy" no longer exists, and Plaintiffs' appeal should be dismissed as moot.

Nor is this a situation in which a plaintiff effectively lost on the merits of her *own claim*, and then invited dismissal in order to appeal that adverse ruling. In that situation, because the claims were adjudicated on the merits, the plaintiff has a personal stake in pressing her objections on appeal. Thus, in *Procter & Gamble*, 356 U.S. at 680-81, a district court ordered the United States to produce grand jury testimony in the course of a civil suit and, when the government refused and suggested dismissal, the court dismissed the suit with prejudice. The Supreme Court explained that, when the dismissal occurred, the government "had lost on the merits." *Id.* at 681. In other words, a win on appeal would revive the government's *own* claims.

This narrow exception does not apply here because Plaintiffs did not lose on the merits of their individual claims when the district court struck the class allegations. To the contrary, the district court's order—like a denial of class certification—had "no legal effect on the named plaintiff's ability to proceed with his individual claim." *Moses H. Cone Mem. Hosp. v. Mercury Const.*, 460 U.S. 1, 10 n.11 (1983).

Because the district court's ruling on Microsoft's motion to strike did not "touch the merits" of Plaintiffs' claims, *Gardner v. Westinghouse Broad. Co*, 437 U.S. 478, 482 (1978), Plaintiffs cannot appeal from the voluntary dismissal of their claims. *See also* Limits of Consent, *supra* at 477 ("The only exception [to the rule against appealing voluntary dismissals] is where the interlocutory ruling being challenge effectively operates a ruling on the merits . . . . By definition, a ruling denying class certification is procedural in nature and does not resolve the merits of the named plaintiffs' individual claim.").

Stated differently, Plaintiffs' desire to represent others in a putative class action is insufficient to give them a "personal stake in the outcome of the controversy," as required by Article III. *Summers*, 555 U.S. at 493 (internal quotation marks and citation omitted). When a plaintiff's "substantive claims become moot in the Art. III sense . . . the court retains no jurisdiction over the controversy of the individual plaintiffs." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980); *see also O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) (a named plaintiff who cannot "establish[] the requisite of a case or controversy" cannot "seek relief on behalf of himself or any other member of the class"). As the Fourth Circuit explained, "when a putative class plaintiff voluntarily dismisses the individual claims underlying a request for class certification, . . . there is no longer a 'self-interested party advocating' for class treatment in the manner necessary to satisfy Article III standing requirements." *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 100 (4th Cir. 2011); *see also Camesi*, 729 F.3d at 247-48 (plaintiffs' "voluntary dismissal of

their claims with prejudice . . . has not only extinguished [their] individual claims, but also any residual representational interest that they may have once had").[3]

The well-settled rule precluding an appeal from a voluntary dismissal bars Plaintiffs' appeal here. Regardless of whether the district court erred in striking the class allegations from their complaint, because Plaintiffs' individual claims were dismissed with prejudice, those claims are gone forever and Plaintiffs have nothing to gain from a favorable ruling on appeal. Plaintiffs thus lack a "personal stake" in the appeal, and their appeal should be dismissed as moot.

B. Section 1291's Finality Requirement Is Not Satisfied If Plaintiffs May Revive Their Claims.

Plaintiffs attempt to avoid the consequences of their own choice to dismiss their claims with prejudice by treating it as a conditional dismissal.

---

[3] In *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), the Court recognized a limited exception to this rule to allow for the appeal of a denial of class certification where the named plaintiff's claims become moot through circumstances outside the plaintiff's control. *See* 445 U.S. at 403-04. In reaching this result, the Court expressly noted that it was *not* holding that this exception would apply where, as here, a plaintiff voluntarily arranges for his claims be dismissed. *Id.* at 404 n.10 ("We intimate no view as to whether a named plaintiff who settles the individual claim after denial of class certification may, consistent with Art. III, appeal from the adverse ruling on class certification.")

According to Plaintiffs, if they prevail on appeal, they may "revive" their claims on remand, and thus the dismissal with prejudice takes effect only if the district court's order striking their class allegations is affirmed on appeal. Br. in Opp. 16 n.4. This sort of conditional dismissal does not exist under the Federal Rules of Civil Procedure, and is not what the district court ordered. In any event, even if Plaintiffs could have conditionally dismissed their claims pending appeal, appellate jurisdiction would still be lacking.

Federal courts of appeals are vested only with the jurisdiction conferred on them by statute. Section 1291—the asserted basis for appellate jurisdiction here—provides jurisdiction only for appeals from "final decisions" of the district court. 28 U.S.C. § 1291. As the Court explained in *Livesay*, "[t]he finality requirement in § 1291 evinces a legislative judgment that '[r]estricting appellate review to "final decisions" prevents the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy.'" 437 U.S. at 471 (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974)).

In *Livesay*, the Court reaffirmed the principle that appellate review of interlocutory orders typically must wait until after final judgment, and unanimously held that an order denying class certification is not immediately appealable under Section 1291. *Id.* at 470. In reaching this result, the Court explained that "a district court's order denying or granting class status is inherently tentative," because the order "may be altered or amended before

the decision on the merits." *Id.* at 469 n.11 (internal quotation marks omitted). Given that the "refusal to certify a class is inherently interlocutory," any appeal of such an order under Section 1291 must wait until after the plaintiff has litigated his individual claims on the merits and final judgment is entered on those claims. *Id.* at 470. That is true even if the order denying class certification sounds the "death knell" for the plaintiffs' claims. *Id.*

Plaintiffs' voluntary dismissal rule cannot be squared with *Livesay*. Orders denying class certification or striking class allegations are just as tentative and subject to amendment now as they were when the Court decided *Livesay*. Yet, as under the death knell doctrine, the Ninth Circuit allows plaintiffs who do not wish to pursue their individual claims to take an immediate appeal of the class certification denial and, if they prevail on appeal, the litigation will resume on remand.[4] Because there is no practical difference between the Ninth Circuit's voluntary dismissal rule and the death knell doctrine, *Livesay* compels a holding that Section 1291 does not provide jurisdiction in this case.

---

[4] If anything, the voluntary dismissal rule is even more capacious than the death knell doctrine. Under the death knell doctrine, plaintiffs did not merely have to dismiss their claims; they had to prove that it would be infeasible for them to pursue their claims on an individual basis. *Livesay*, 437 U.S. at 466. Under the Ninth Circuit's rule, plaintiffs can dismiss their claims and take an appeal at whim, even without a finding from the district court that it would be impractical to continue litigating their claims on an individual basis.

Attempting to distinguish *Livesay*, Plaintiffs contend that Section 1291's finality requirement is satisfied here because they voluntarily dismissed their individual claims with prejudice. Br. in Opp. 16-18. But, as discussed above, if plaintiffs truly dismissed their claims with prejudice, they would have no personal stake in an appeal and their case would be moot. Thus, Plaintiffs' entire gambit in this case depends on the argument that the dismissal of their claims was *not*, in fact, with prejudice. But if that is correct—and Plaintiffs' can revive their claims on remand—then there is no appellate jurisdiction under Section 1291 for all the same reasons recognized by this Court in *Livesay*.

II. The Ninth Circuit's Voluntary Dismissal Rule Wastes Judicial Resources and Distorts Class Action Practice.

If Plaintiffs' claims were truly dismissed with prejudice, then their appeal is moot. If Plaintiffs' claims were not dismissed with prejudice, then there is no final judgment under Section 1291. Any holding to the contrary would not only be contrary to settled law, it also would undermine the policies embodied in Section 1291 by encouraging piecemeal appeals, unfairly prejudice class-action defendants, and undermine Federal Rule of Civil Procedure 23(f).

A. The Ninth Circuit's Voluntary Dismissal Rule Suffers from the Same Flaws as the Death Knell Doctrine.

In rejecting the death knell doctrine, the Court recognized at least two fundamental flaws in the doctrine: (i) it wastes judicial resources by encouraging

piecemeal appeals, and (ii) it applies only to appeals by plaintiffs of orders denying class certification, even though defendants have an equally strong interest in obtaining immediate appellate review of orders granting class certification. *See Livesay*, 437 at 470-74. The Ninth Circuit's voluntary dismissal rule has the same flaws and should be similarly rejected.

1. The "principle vice" of the death knell doctrine was that it "authorize[d] indiscriminate interlocutory review of decisions made by the trial judge." *Id.* at 474. This Court has long recognized that piecemeal appeals can have a "debilitating effect on judicial administration." *Id.* at 471 (internal quotation marks and citation omitted). Yet the death knell doctrine encouraged piecemeal appeals, because it allowed a plaintiff to appeal an order denying class certification before litigating her individual claims on the merits. *See id.* at 474. As the Court recognized, "[t]he potential waste of judicial resources is plain." *Id.* at 473.

As this case demonstrates, the Ninth Circuit's voluntary dismissal rule will also waste judicial resources by encouraging piecemeal appeals. In this case, the court of appeals held that the district court erred in striking the class allegations because the district court relied on a ruling that had since been undermined by an intervening Ninth Circuit decision. Pet. App. 18a-19a. The Ninth Circuit clearly stated that it "express[ed] no opinion," however, on whether a class should be certified. Pet. App. 19a. As a result, the district court must consider on remand any grounds for opposing class certification

that Microsoft may offer in response to a motion to certify the putative class. If the district court denies class certification on any of those grounds, the plaintiffs can voluntarily dismiss their claims again and take another appeal.

To make matters worse, this potential waste of judicial resources is not limited to piecemeal appeals of orders denying class certification. Instead, plaintiffs will likely argue that the voluntary dismissal rule can be used to obtain appellate review of any interlocutory order for which they desire immediate review. In rejecting the death knell doctrine, this Court acknowledged that there was no principled basis for limiting the doctrine to class certification orders. *See Livesay*, 437 U.S. at 470. The Court explained: "[I]f the 'death knell' doctrine has merit, it would apply equally to the many interlocutory orders in ordinary litigation—rulings on discovery, on venue, on summary judgment—that may have such tactical economic significance that a defeat is tantamount to a 'death knell' for the entire case." *Id.* The Third Circuit recently made the same point in rejecting the voluntary dismissal rule. *See Camesi*, 729 F.3d at 245-46 (If the court "were to permit such a procedural sleight-of-hand, there is nothing to prevent litigants from employing such a tactic to obtain review of discovery orders, evidentiary rulings, or any of the myriad decisions that a district court makes before it reaches the merits of an action.").

A case currently pending before the Ninth Circuit demonstrates that this concern is real. In *Strafford v. Eli Lilly and Company*, after the district court denied the plaintiffs' motions for class certifica-

tion, plaintiffs moved to dismiss their individual claims voluntarily with prejudice, and the district court granted their motion. *See* Order, *Strafford v. Eli Lilly & Co.*, No. 12-9366 (C.D. Cal. Oct. 26, 2015) (ECF Dkt. No. 203). The plaintiffs subsequently appealed, challenging not only the class certification denials but also the district court's interlocutory rulings on motions to dismiss and for partial summary judgment, and on a variety of discovery issues. *See* Notice of Appeal, *Strafford v. Eli Lilly & Co.*, No. 12-9366 (C.D. Cal. Nov. 23, 2015) (ECF Dkt. No. 204). The Ninth Circuit recently denied a motion to stay the appeal pending this Court's ruling in this case, *see* Order, *Strafford v. Eli Lilly & Co.*, No. 15-56808 (9th Cir. Mar. 7, 2016) (ECF Dkt. No. 6), and thus the parties will brief a wide range of interlocutory orders in an appeal brought under the voluntary dismissal rule.

2. This Court also concluded that the death knell doctrine was problematic because it "operate[d] only in favor of plaintiffs." *Livesay*, 437 U.S. at 476. As the Court explained, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Id.* The Court recently reiterated that class actions present a significant "risk of 'in terrorem' settlements," because defendants "[f]aced with even a small chance of a devastating loss . . . will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011); *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("A court's

decision to certify a class . . . places pressure on the defendant to settle even unmeritorious claims."). Given these risks, obtaining immediate appellate review of class certification orders "will often be of critical importance to defendants." *Livesay*, 437 U.S. at 476.

Like the discredited death knell doctrine, the Ninth Circuit's voluntary dismissal rule places class-action defendants at an unfair disadvantage. Because only plaintiffs have claims to dismiss, only plaintiffs can use the Ninth Circuit's rule to obtain immediate review of class certification orders. Even though an order certifying a class can have dramatic effects on a defendant, defendants have no comparable method for manufacturing an allegedly final order or for otherwise generating an immediate appeal as a matter of right. The Court should reject the Ninth Circuit's rule, just as it did the death knell doctrine.

B. The Ninth Circuit's Rule Upsets the Balance Struck by Federal Rule of Civil Procedure 23(f).

The Ninth Circuit's voluntary dismissal rule also interferes with the discretionary review of class certification orders provided by Rule 23(f). Adopted in 1998, Rule 23(f) provides for immediate appellate review of class certification orders in limited circumstances. *See* Fed. R. Civ. P. 23(f).[5] This rule

---

[5] Rule 23(f) provides, in relevant part: "A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to (...continued)

did not revive the death knell doctrine that this Court rejected in *Livesay*, 437 U.S. at 463. Instead, it allows for immediate appellate review only in cases selected by the court of appeals, and it does so in a way that avoids the problems created by the death knell doctrine and the Ninth Circuit's voluntary dismissal rule.

1. Rule 23(f) minimizes the possibility of piecemeal appeals by making interlocutory appeals the exception, not the rule. Rather than creating a right to appeal all class certification orders, Rule 23(f) permits a party to petition for appellate review, and the court of appeals exercises discretion to decide whether to hear the case. Fed. R. Civ. P. 23(f). Courts have stated that "Rule 23(f) review should be a rare occurrence," because interlocutory appeals "are disruptive, time-consuming, and expensive." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 955, 959 (9th Cir. 2005).

The discretion provided to courts under Rule 23(f) would become meaningless if this Court upholds the Ninth Circuit's voluntary dismissal rule. Under the Ninth Circuit's rule, a plaintiff can force a court of appeals to hear an immediate appeal of an order denying class certification, even if the court already denied a Rule 23(f) petition. Indeed, that is precisely what happened in this case. Pet. App. 10a, 12a. In order to further Rule 23(f)'s objective of giv-

---

appeal is filed with the circuit clerk within 14 days after the order is entered." Fed. R. Civ. P. 23(f).

ing courts—and not plaintiffs—the discretion to determine which class certification orders deserve immediate appellate review, the Court should reject the voluntary dismissal rule.

2. Rule 23(f) also treats plaintiffs and defendants equally by allowing any party to petition for appellate review of class certification orders. Fed. R. Civ. P. 23(f). The Committee Note explains that the rule applies to all parties because all parties have an interest in seeking immediate appellate review:

> An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits on an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.

Fed. R. Civ. P. 23 Committee Note (1998).

Consistent with this Committee Note, courts of appeals have treated plaintiffs and defendants similarly in applying Rule 23(f). As the Seventh Circuit has explained, "just as a denial of class status can doom the plaintiff, so a grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). A recent study

found that Rule 23(f) petitions filed by plaintiffs and defendants are granted at roughly the same rate.[8]

All parties will no longer be treated equally if the Court upholds the Ninth Circuit's voluntary dismissal rule. Defendants can still take an immediate appeal of an order granting class certification only when a Rule 23(f) petition is granted. Plaintiffs, in contrast, can first petition for review under Rule 23(f), and—if the petition is denied—they can then take an appeal as of right under Section 1291 and the voluntary dismissal rule.

In sum, Rule 23(f) reflects the policy judgments that immediate appeals of class certification orders should be allowed only when permitted by the courts of appeals, and that the opportunity to appeal should be available on equal terms to both plaintiffs and defendants. Like the death knell doctrine before it, the Ninth Circuit's voluntary dismissal rule frustrates these objectives by allowing plaintiffs, but not defendants, to appeal orders denying class certification whenever they prefer an immediate appeal over litigating the merits of their claims.

---

[8] Courts of appeals have granted 20.5% of the petitions filed by plaintiffs, and 24.8% of the petitions filed by defendants. *See* John Beisner et al., *Study Reveals US Courts of Appeals Are Less Receptive to Reviewing Class Certification Rulings* (Apr. 29, 2014), http://bit.ly/1GNGoI5.

III. The Ninth Circuit's Voluntary Dismissal Rule Cannot Be Saved By Allowing Plaintiffs To Pursue Appeal After a Permanent Dismissal of Their Claims.

Plaintiffs have never argued that, even if their claims cannot be revived, they may still appeal the order striking the class allegations from their complaint. But even if this argument were not waived, the Court should still reject it. The Ninth Circuit's voluntary dismissal rule cannot be saved by allowing a named plaintiff who has truly dismissed her claim with prejudice to nonetheless represent a class. That is because the desire to represent a class is not enough to satisfy Article III's "case or controversy" requirement. *See* Part I.A.

Moreover, even ignoring the Article III problems, the Ninth Circuit's voluntary dismissal rule would create the very problems that Rule 23(f) was designed to avoid. The potential waste of judicial resources from piecemeal appeals would still exist—the only difference would be that each appeal would be taken by a different named plaintiff. *See supra* pp. 16, 19-20. And the rule would still unfairly disadvantage defendants, because only plaintiffs can manufacture a supposedly final judgment by dismissing their claims. *See supra* p. 18.

But the voluntary dismissal rule would also create additional problems if a plaintiff could continue to represent a class after her claim had been dismissed with prejudice. If a plaintiff could give up her claims for the benefit of the putative class, her personal interests would often be at odds with the

interests of her lawyer. This is especially true when the lawyer has taken the case on a contingency fee, as is typical for class actions. The plaintiff may prefer to continue litigating her individual claims even if the potential recovery is relatively small, because a relatively small recovery is better than no recovery at all. But the class action lawyer often takes a plaintiff's case on a contingency fee only for the potential of a class-wide recovery. That lawyer has little incentive to continue representing the plaintiff on her individual claims, and thus will have every incentive to discourage the plaintiff from continuing to litigate her claims, even if they have merit.

This Court has repeatedly sought to avoid interpreting class action rules in a way that creates a conflict between the interests of plaintiffs and class counsel. For example, in *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345 (2013), the Court unanimously rejected the common tactic of plaintiffs' lawyers' "stipulating away" putative class claims above $5 million to evade jurisdiction under the Class Action Fairness Act. As the Court recognized, this practice impermissibly allowed named plaintiffs and their lawyers to give up claims of absent class members. *Id.* at 1348-49. Similarly, in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the Court rejected an interpretation of Rule 23(b)(2) that would have "create[d] perverse incentives for class representatives to place at risk potentially valid claims for monetary relief." *Id.* at 2559.

The potential for conflicts of interest is even greater here. If counsel is successful in persuading the named plaintiff to dismiss her claims, counsel

can control the litigation on appeal without accountability to a client with a personal interest in the action. It is a foundational principle of legal ethics that an attorney should abide by the client's preferences and litigation goals, rather than his or her own self-interest. *See* Model R. of Prof'l Conduct 1.2(a). But here the client's preferences would be irrelevant because the client no longer has an interest in the litigation. As a result, the case would become a matter of "a lawyer who no longer has a client." *See Geraghty*, 445 U.S. at 424 (Powell, J., dissenting).

Class litigation is already "dysfunctional," because often "the principals [i.e., the plaintiffs] cannot effectively monitor their agent [i.e., their lawyer]." John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370, 371 (2000). Class action lawyers often "ignore the preferences of individual class members" and "define the goals of the litigation differently than they otherwise would." *Id.* at 379. This happens even when class counsel have an interested client to whom they owe fiduciary duties. The problem will only be exacerbated if class counsel can pursue appeals on behalf of a putative class without a client who has a personal stake in the case's outcome.

To minimize these problems, the Court should reject the Ninth Circuit's voluntary dismissal rule and hold that the court of appeals lacked jurisdiction to hear Plaintiffs' appeal. That is true regardless of whether the Ninth Circuit would allow a plaintiff to revive her claims on remand.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

Kate Comerford Todd
Warren Postman
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062

Counsel for the Chamber of Commerce of the United States of America

Mark W. Mosier
Counsel of Record
Michael M. Maya
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
mmosier@cov.com
(202) 662-6000

Counsel for amici curiae

H. Sherman Joyce
Lauren Sheets Jarrell
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, NW, Suite 400
Washington, DC 20036

Counsel for American Tort Reform Association

Deborah R. White
Retail Litigation Center, Inc.
1700 N. Moore Street
Suite 2250
Arlington, VA 22209
(703) 600-2067

Counsel for Retail Litigation Center, Inc.

March 2016

RECORD
NO. 1
BRIEFS

Supreme Court, U.S.
FILED
MAR 17 2016
OFFICE OF THE CLERK

No. 15-457

IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

v.

SETH BAKER, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF CIVIL PROCEDURE SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Robert M. Loeb
Thomas M. Bondy
Randy J. Kozel
Randall C. Smith
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005

E. Joshua Rosenkranz
Counsel of Record
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5380
jrosenkranz@orrick.com

Counsel for *Amici Curiae*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. Rule 23(f) Was Crafted to Balance the Benefits of Immediate Review Against the Costs of Interlocutory Appeals. 6

A. Emergence of the Death Knell Doctrine 7

B. Rejection of the Death Knell Doctrine 9

C. Promulgation of Rule 23(f) to Govern Interlocutory Appeals of Class Certification Decisions 11

II. Using Voluntary Dismissals With Prejudice to Force Immediate Review of Class Certification Denials Would Circumvent Rule 23(f). 14

III. Respondents' Voluntary Dismissal With Prejudice Following Denial of Class Certification Is Not a Final Decision Under 28 U.S.C. § 1291 19

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

Cases

In re Alleghany Corp.,
634 F.2d 1148 (8th Cir. 1980) 11

Arias v. Cameron,
776 F.3d 1262 (11th Cir. 2015) 15

Baker v. Microsoft Corp.,
797 F.3d 607 (9th Cir. 2015) 19

Blair v. Equifax Check Servs., Inc.,
181 F.3d 832 (7th Cir. 1999) 18

Cobbledick v. United States,
309 U.S. 323 (1940) 20

Cohen v. Beneficial Indus. Loan Corp.,
337 U.S. 541 (1949) 20

Coopers & Lybrand v. Livesay
437 U.S. 463 (1978) 3, 7, 8, 9, 10, 15, 16, 17, 21

Dig. Equip. Corp. v. Desktop Direct, Inc.,
511 U.S. 863 (1994) 20

Eisen v. Carlisle & Jacquelin,
370 F.2d 119 (2d Cir. 1966) 8

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974) 20

Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 176 (2d Cir. 1990) 20

Gosa v. Sec. Inv. Co., 449 F.2d 1330 (5th Cir. 1971) 16

Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100 (2009) 5, 21, 22

In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995) 11

Swint v. Chambers Cty. Comm'n, 514 U.S. 35 (1995) 5, 6, 21, 22

Statutes

28 U.S.C. § 1291 ..... 3, 4, 5, 6, 7, 9, 10, 19, 20, 21

28 U.S.C. § 1292 ..... 5, 6, 7, 9, 11, 12, 21, 22

28 U.S.C. § 2072 ..... 5, 6, 11

Federal Rules and Regulations

Fed. R. Civ. P. 23 ..... *passim*

Fed. R. Civ. P. 41 15

177 F.R.D. 530 (1998) 7

Other Authorities

1 Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23 (Rules Comm. Support Office, Admin. Office of the U.S. Courts, May 1, 1997) 12

2 McLaughlin on Class Actions § 7.1 (12th ed. 2015) 12, 19

9 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2364 (3d ed. 2008) 15

Judicial Conference of the United States, *Minutes of the Civil Rules Advisory Committee*, November 9 (1995) 12, 13

INTEREST OF *AMICI CURIAE*[1]

Amici Civil Procedure Scholars are law professors who teach and write in the field of federal civil procedure:

Stephen B. Burbank is the David Berger Professor for the Administration of Justice at the University of Pennsylvania Law School.

Geoffrey C. Hazard, Jr. is the Trustee Professor of Law Emeritus at the University of Pennsylvania Law School, the Thomas E. Miller Distinguished Professor of Law Emeritus at the University of California's Hastings College of Law, and the Sterling Professor Emeritus of Law at the Yale Law School.

William H. J. Hubbard is Assistant Professor of Law at the University of Chicago Law School.

Thomas D. Rowe, Jr. is the Elvin R. Latty Professor Emeritus of Law at Duke University School of Law. He served on the Advisory Committee on Rules of Civil Procedure for the Judicial Conference of the United States during the period when Federal Rule of Civil Procedure 23(f) was considered and adopted.

---

[1] The parties have consented to the filing of this *amicus* brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

Michael E. Solimine is the Donald P. Klekamp Professor of Law at the University of Cincinnati College of Law.

Jay Tidmarsh is Professor of Law at Notre Dame Law School.

Tobias Barrington Wolff is Professor of Law at the University of Pennsylvania Law School.

Rule 23(f) sets forth the process for requesting an immediate appeal of a class certification ruling. *Amici* submit that allowing parties to force an immediate appeal through a voluntary dismissal with prejudice would undermine Rule 23(f) and contravene the finality requirement of 28 U.S.C. § 1291.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has determined that class certification rulings are not "final decisions" appealable as of right under 28 U.S.C. § 1291. Whether a district court grants or denies a motion for class certification, the party on the losing end has no entitlement to an immediate appeal. Such an appeal as of right arises only after a final judgment has issued. As this Court explained in *Coopers & Lybrand v. Livesay*, class certification rulings are "inherently interlocutory." 437 U.S. 463, 470 (1978).

Although they are not appealable as of right, class certification rulings can be important to the path of litigation. A denial of class certification can make it economically imprudent (or impossible) to continue pressing individual claims, whereas a grant of certification can increase pressure to settle. In two separate statutory amendments in 1990 and 1992, Congress authorized this Court to issue rules addressing the question of appellate jurisdiction in these and other circumstances. The Advisory Committee on Rules of Civil Procedure for the Judicial Conference of the United States ("Advisory Committee") accepted Congress's invitation by proposing a rule that allows a party aggrieved by a ruling on class certification to request an immediate appeal by permission of the appellate court. This Court promulgated that rule, which became effective in 1998. The process for requesting appellate review is set forth in Rule 23(f) of the Federal Rules of Civil Procedure.

In fashioning Rule 23(f), the Advisory Committee recognized the impact that certification rulings can have on whether a case proceeds to trial, settles, or is abandoned. At the same time, the Committee feared that a proliferation of interlocutory appeals would erode the finality principle of § 1291 and encourage piecemeal litigation through multiple appeals in a single case. Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment. To address these concerns, the Committee crafted Rule 23(f) to permit plaintiffs and defendants to request immediate review of certification decisions, but empowered appellate courts, within their discretion, to determine whether an appeal should go forward.[2]

Respondents are proposing a doctrine that would subvert the balance of competing policies that Rule 23(f) struck. They contend that a petition under Rule 23(f) is merely an optional first step for a plaintiff whose request for class certification has been denied. Even if the court of appeals declines to hear an interlocutory appeal—as the Ninth Circuit did in this case—plaintiffs have a simple recourse: They can voluntarily dismiss their claims with prejudice. Through dismissal, respondents argue, the plaintiffs acquire an immediate right to appeal, with no room remaining for the exercise of discretion by the appellate court.

---

[2] The analysis in this brief applies in equal measure whether the appeal challenges a district court order denying class certification or striking the class allegations from the complaint.

This use of voluntary dismissals with prejudice to force appellate review would undermine Rule 23(f). Rule 23(f) establishes a procedural mechanism for interlocutory review of class certification rulings that is discretionary, balanced as between plaintiffs and defendants, and designed to minimize disruption of the trial process. Permitting plaintiffs' dismissal tactic would supplant that mechanism and replace it with a system in which plaintiffs (and only plaintiffs) are authorized to demand interlocutory review of class certification rulings as a matter of right.

The finality requirement of 28 U.S.C. § 1291 forecloses any such dilution of Rule 23(f). As this Court explained in 1995, the available mechanisms for interlocutory appeal are "[o]f prime significance to the jurisdictional issue" of whether there has been a final decision under § 1291. *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 45 (1995). The Court has refused to interpret § 1291 in a way that would "undermin[e]" established procedures for interlocutory review. *Id.* at 47. Congress's twin grants of tailored rulemaking power in 28 U.S.C. §§ 2072(c) and 1292(e) represent a designation of "rulemaking, not expansion by court decision, as the preferred means for determining whether and when prejudgment orders should be immediately appealable." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 113 (2009) (internal citations and quotation marks omitted).

The Advisory Committee and this Court could have written Rule 23(f) to allow immediate appeals as a matter of right after any class certification ruling. They did not. In light of the congressional preference

for rulemaking, the balance struck by Rule 23(f) "warrants the Judiciary's full respect," *Swint*, 514 U.S. at 48, and this Court should not construe § 1291's finality principle in a way that would subvert Rule 23(f).[3]

ARGUMENT

I. Rule 23(f) Was Crafted to Balance the Benefits of Immediate Review Against the Costs of Interlocutory Appeals.

Congress gave this Court the power to prescribe general rules of practice and procedure in 1934. 28 U.S.C. § 2072. In 1990, Congress supplemented that delegation by empowering this Court to promulgate rules to "define when a ruling of a district court is final for the purposes of appeal under section 1291." Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 315, 104 Stat. 5089, 5115 (1990) (codified at 28 U.S.C. § 2072(c)). In 1992, Congress authorized the Court to make rules "to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for" by 28 U.S.C. § 1292(a)-(d). Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 101, 106 Stat. 4506, 4506 (1992) (codified at 28 U.S.C. § 1292(e)).

---

[3] *Amici curiae* do not address here whether respondents' attempt to appeal from a voluntary dismissal with prejudice following the district court's order striking the class allegations from the complaint creates a jurisdictional problem under Article III of the Constitution.

This Court promulgated Rule 23(f) under the authority granted to it by 28 U.S.C. § 1292(e). 177 F.R.D. 530 (1998). The Rule sets out the process by which an appellate court can authorize an immediate appeal from an order granting or denying class certification. The centerpiece of the Rule is its emphasis on appellate court discretion. Appellate courts are not required to entertain appeals from class certification rulings. Instead, the Rule provides that they "may permit an appeal." It is up to the appellate court—not the litigants or the district court—whether an immediate appeal will lie.

This discretionary regime reflects a considered choice. The Advisory Committee was sensitive to the value of immediate appeals in some cases, but it was equally sensitive to the dangers of eroding the final judgment rule of 28 U.S.C. § 1291 by making interlocutory review the norm. To understand the Committee's rationale and Rule 23(f)'s ultimate formulation, it is useful to examine the historical backdrop against which the Committee acted.

A. Emergence of the Death Knell Doctrine

Federal appellate courts have jurisdiction over "all final decisions of the district courts of the United States." 28 U.S.C. § 1291. An appeal as of right extends only to final decisions and a limited class of specified nonfinal orders (such as injunctive orders), 28 U.S.C. § 1292(a). Class certification decisions do not fit the bill; as this Court has explained, they are "inherently interlocutory." *Livesay*, 437 U.S. at 470.

Following the 1966 amendments to Rule 23, which gave rise to Rule 23 in its modern form, *see* Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment, some lower courts held that denials of class certification could be final decisions under § 1291. Those courts thought that a denial of class status could create a right of appeal if it was "likely to sound the 'death knell' of the litigation" by removing "the incentive of a possible group recovery." *Livesay*, 437 U.S. at 469. This "death knell doctrine" was founded on two considerations. The first was that when each individual's claim is small, the denial of class certification can make it unlikely that the case will proceed to final judgment. *See id.* at 469-70 (noting the possibility that "the individual plaintiff may find it economically imprudent to pursue his lawsuit to a final judgment"). The second was that if the denial of class status led individual plaintiffs to abandon their claims, the underlying class certification decision would never be reviewed. As the Second Circuit explained at the time, "[i]f the appeal is dismissed, not only will [the individual plaintiff's] claims never be adjudicated, but no appellate court will be given the chance to decide if this class action was proper under . . . Rule 23." *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119, 120 (2d Cir. 1966).

The death knell doctrine was not absolute. Instead, it turned on a determination of the impact of denying class certification in a particular case. If an appellate court concluded that the plaintiff retained an "adequate incentive to continue" pressing his individual claims even after class treatment was denied, the order denying class status was "considered interlocutory." *Livesay*, 437 U.S. at 471.

If, however, the court believed that the denial of class status "ma[de] further litigation improbable," a different result followed. *Id.* The order denying class certification was transformed into a "final decision" that was "appealable as a matter of right." *Id.*

B. Rejection of the Death Knell Doctrine

In *Livesay*, this Court squarely rejected the death knell doctrine. In doing so, the Court underscored that "refusal to certify a class is inherently interlocutory." 437 U.S. at 470. The Court acknowledged that the refusal to certify a class "may induce a party to abandon his claim before final judgment." *Id.* at 477. Nevertheless, it held that the risk of abandonment "is not a sufficient reason for considering it a 'final decision' within the meaning of § 1291." *Id.*

As this Court explained, the death knell doctrine ran afoul of § 1291 by authorizing "*indiscriminate* interlocutory review of decisions made by the trial judge." *Id.* at 474. Interlocutory review of nonfinal decisions could be sought under 28 U.S.C. § 1292(b). But although § 1292(b) allowed for the possibility of immediate appeals, it also set forth meaningful limits. Most importantly, appeals under § 1292(b) are not available as of right. By contrast, the death knell doctrine "thrust[] appellate courts indiscriminately into the trial process and thus defeat[ed] one vital purpose of the final judgment rule—that of maintaining the appropriate relationship between the respective courts." *Id.* at 476.

By circumventing the procedures for interlocutory review and distorting the meaning of "final decisions" under § 1291, the death knell doctrine invited protracted litigation and piecemeal appeals. Moreover, once an appellate court agreed to review a class certification ruling, there was "no assurance that the trial process will not again be disrupted by interlocutory review." *Id.* at 474. As *Livesay* explained, "even if a ruling that the plaintiff does not adequately represent the class is reversed on appeal, the district court may still refuse to certify the class" on some other ground, for instance that "common questions of law or fact do not predominate." *Id.* In that event, "plaintiff would again be entitled to an appeal as a matter of right pursuant to § 1291." *Id.* And so the cycle would continue, with the possibility of multiple appeals on the class action question alone, in addition to eventual challenges to an ultimate decision on the merits.

Livesay also criticized the one-sidedness of the death knell doctrine. The rule operated "only in favor of plaintiffs" despite the fact that "the class issue—whether to certify, and if so, how large the class should be—will often be of critical importance to defendants as well." *Id.* at 476. As this Court observed, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Id.*

C. Promulgation of Rule 23(f) to Govern Interlocutory Appeals of Class Certification Decisions

In the wake of *Livesay*'s rejection of the death knell doctrine and reaffirmation that class certification rulings are not appealable as of right, a party seeking interlocutory review of such an order had two main options. The first, as noted above, was a discretionary appeal under 28 U.S.C. § 1292(b), which effectively requires permission to appeal from both the district court and the court of appeals. Second, in an extreme case, the party could seek review by writ of mandamus.[4] And, of course, there was always the possibility of litigating the case to a final decision, at which point the class certification ruling—as well as other rulings and decisions—could be appealed under 28 U.S.C. § 1291.

That was the backdrop for Congress's twin grants of targeted rulemaking power in 28 U.S.C. §§ 2072(c) and 1292(e), the latter of which led to the drafting, consideration, and promulgation of Rule 23(f). Rule 23(f) arose out of concerns that the combination of § 1292(b) and mandamus was insufficient and ill-suited for appellate review of class certification rulings. The proponents of the Rule argued that those mechanisms "provide review in only a small fraction

---

[4] *See, e.g., In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1304 (7th Cir. 1995) (granting petition for writ of mandamus and directing district court to decertify class). *But see In re Alleghany Corp.*, 634 F.2d 1148, 1151 (8th Cir. 1980) ("Mandamus is not to be used as a substitute for interlocutory appeal of district court orders in complex civil cases.").

of cases," and that a new rule was necessary. 1 Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23 at 411 (Rules Comm. Support Office, Admin. Office of the U.S. Courts, May 1, 1997); *see also* Judicial Conference of the United States, *Minutes of the Civil Rules Advisory Committee* at 18, June 19-20 (1997) ("[T]he advisory committee believed that appellate review of class action determinations was very beneficial and should not be impeded by the restraints imposed by mandamus and 28 U.S.C. § 1292(b)."); 2 McLaughlin on Class Actions § 7.1 (12th ed. 2015) ("While in the 1990s a growing number of circuit courts were willing in exceptional circumstances to review class certification rulings ... , in the great majority of cases courts required review of class certification decisions to await final judgment.") (footnotes omitted). Others, however, cautioned that expanding the availability of interlocutory review would "run[] counter to the federal policy against piecemeal appeals." 1 Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23 at 407 (Rules Comm. Support Office, Admin. Office of the U.S. Courts, May 1, 1997).

Rule 23(f) reflects a compromise between these competing positions. The provision, which has undergone only minor revisions since 1998, states in its current form:

> A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered.

> An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.[5]

The provision establishes a process for the immediate review of class certification rulings, potentially facilitating the review of more cases and spurring the refinement of certification standards among the appellate courts. But the Advisory Committee rejected the idea that such appeals should be available as a matter of right. *See* Judicial Conference of the United States, *Minutes of the Civil Rules Advisory Committee* at 4, November 9 (1995) (Advisory Committee considered the argument that "there should be an opportunity to appeal as of right, even broader than the former 'death-knell' theory," but rejected that argument based on concerns that "a right to appeal would lead to abuse").

Rule 23(f) thus reaffirms the understanding that class certification rulings are not final and appealable as of right, even if they make it economically imprudent (or impossible) for the plaintiffs in a particular case to proceed on an individual basis. Heeding this Court's warnings in *Livesay* about excessive appeals of class certification rulings, those who fashioned Rule 23(f) rejected any notion of an automatic right to appeal. They left the matter

---

[5] The provision's phrasing was slightly altered, in a manner that was intended to be "stylistic only," in 2007, *see* Fed. R. Civ. P. 23(f) advisory committee's note to 2007 amendment, and the time limit for an appeal was changed from ten days to fourteen days in 2009, *see* Fed. R. Civ. P. 23(f) advisory committee's note to 2009 amendment.

instead to the discretion of the appellate courts. *See* Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment ("Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals.").

II. Using Voluntary Dismissals With Prejudice to Force Immediate Review of Class Certification Denials Would Circumvent Rule 23(f).

Rule 23(f) reflects the understanding that class certification rulings are not final decisions appealable as of right under § 1291, irrespective of whether a case is likely to proceed on an individual basis. As the Advisory Committee noted, "[a]n order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation." Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment. The Rule balances the value of allowing interlocutory review of class certification rulings in certain circumstances against the concerns about erosion of the finality requirement that led this Court to reject the death knell doctrine in *Livesay*. Endorsing respondents' dismissal theory for forcing appellate review would undermine this balance and revive the death knell doctrine.

A. Rule 23(f) does not allow appeals from class certification decisions as a matter of right. On the contrary, the appeals process it creates is permissive; the courts of appeals have "unfettered discretion

whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari." Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment. The Rule accordingly forestalls what this Court in *Livesay* identified as the "principal vice" of the death knell doctrine: the practice of authorizing appeals of class certification decisions "as a matter of right." 437 U.S. at 474.

Endorsing the dismissal vehicle would erase the discretion Rule 23(f) confers. Any plaintiff who did not seek appellate review under Rule 23(f) or whose petition for permission to appeal was denied could move to dismiss with prejudice under Fed. R. Civ. P. 41. Because trial courts generally lack discretion to deny a plaintiff's motion for a voluntary dismissal with prejudice,[6] the tactic would empower plaintiffs to force an immediate appeal from a class certification decision as a matter of right.

The voluntary dismissal option would not merely resuscitate the death knell doctrine; it would supercharge it. Under the death knell doctrine, courts of appeals had the power to decline an appeal if the death knell had not in fact sounded—which is to say,

---

[6] *See* 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2364 (3d ed. 2008). In this respect, voluntary dismissals with prejudice differ from voluntary dismissals without prejudice. Outside the narrow window established by Fed. R. Civ. P. 41(a)(1), and in the absence of an agreement among the parties, district courts have broad discretion to determine whether to grant a motion for a voluntary dismissal without prejudice. *See, e.g.*, *Arias v. Cameron*, 776 F.3d 1262, 1268 (11th Cir. 2015).

if the litigation was likely to proceed without certification of a class. *See, e.g., Gosa v. Sec. Inv. Co.*, 449 F.2d 1330, 1332 (5th Cir. 1971). Under respondents' theory, appellate courts lack that authority. Respondents' argument, if accepted, would mean that the true power always resides with the plaintiff, who—either after the Rule 23(f) option does not work out, or without bothering to request permission to appeal under Rule 23(f)—can seek to force the issue by moving for a voluntary dismissal with prejudice. Far from the extensive discretion they are granted under Rule 23(f), appellate courts would be left with no discretion at all.

B. Moreover, accepting the voluntary dismissal option for forcing interlocutory review of a class certification decision would create a loophole available only to plaintiffs. In *Livesay*, this Court rejected the death knell doctrine in part because it "operate[d] only in favor of plaintiffs even though the class issue—whether to certify, and if so, how large the class should be—will often be of critical importance to defendants as well." 437 U.S. at 476.

In both design and application, Rule 23(f) dovetails with *Livesay*'s teaching that the mechanisms for immediate appeal should be evenhanded. Rule 23(f) permits appeals from both denials and grants of class certification. This neutrality reflects the Advisory Committee's observation that just as a denial of class certification may make it economically imprudent to continue to press individual claims and thus cause the named plaintiffs to dismiss their claims, "[a]n order granting certification ... may force a defendant to settle rather

than incur the costs of defending a class action and run the risk of potentially ruinous liability." Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment.

Under respondents' theory, however, plaintiffs—but not defendants—may be able in effect to obtain automatic appellate review of a class certification ruling. The one-sidedness of this approach is at odds with Rule 23(f).

C. Finally, Rule 23(f) is designed to avoid the death knell doctrine's propensity to "thrust[] appellate courts indiscriminately into the trial process," upsetting "the appropriate relationship between the respective courts" and wasting judicial resources. *Livesay*, 437 U.S. at 476 (internal citations and quotation marks omitted). To that end, the Rule established a ten-day (later changed to fourteen-day) time limit within which a party desiring interlocutory review must seek permission to appeal. Fed. R. Civ. P. 23(f) advisory committee's note to 2009 amendment. That time limit "is designed to reduce the risk that attempted appeals will disrupt continuing proceedings." Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment.

The Rule's stay provision is to the same effect. Rule 23(f) directs that "[a]n appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders." Fed. R. Civ. P. 23(f). The Advisory Committee observed, moreover, that "[a] stay should be sought first from the trial court," and admonished that "[i]f the trial court refuses a stay, its action and any explanation of its

views should weigh heavily with the court of appeals." Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment. As Judge Easterbrook observed: "Rule 23(f) is drafted to avoid delay. Filing a request for permission to appeal does not stop the litigation unless the district court or the court of appeals issues a stay—and a stay would depend on a demonstration that the probability of error in the class certification decision is high enough that the costs of pressing ahead in the district court exceed the costs of waiting." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 835 (7th Cir. 1999).

The dismissal option would nullify these procedural gains. It would permit a plaintiff to disregard the Rule's time limits and would operate effectively as an automatic stay. The timeline of the present case is illustrative. The decision striking the class allegations that respondents seek to challenge was rendered in March 2012. Respondents moved to dismiss in September 2012, and filed their notice of appeal in November 2012. The Ninth Circuit did not issue its decision on the class certification question until nearly three years after the district court's decision striking the class allegations. Nothing happened in the district court between October 2012 and August 2015, when the district court vacated its prior order striking the class allegations. *See* Stipulation and Order, *Baker v. Microsoft Corp.*, No. 2:11cv722 (W.D. Wash. Oct. 16, 2012), ECF No. 37; Notice of Appeal, *Baker v. Microsoft Corp.*, No. 2:11cv722 (W.D. Wash. Nov. 15, 2012), ECF No. 38; Order Vacating Prior Order Striking Class Allegations, *Baker v. Microsoft Corp.*, No. 2:11cv722 (W.D. Wash. Aug. 10, 2015), ECF No. 45. If this Court

validates respondents' dismissal theory, such delays are likely to become routine, with putative class actions regularly entering periods of protracted dormancy while certification rulings are appealed.

The contrast with the system created by Rule 23(f) is stark. Respondents would supplant a system that emphasizes appellate court control, evenhanded treatment of parties, and minimization of disruption and delay in the trial process with an approach that allows every plaintiff (but no defendant) to demand immediate appellate review and halt proceedings in the district court. The doctrine would subvert Rule 23(f) and therefore should be rejected. *See* 2 McLaughlin on Class Actions § 7.1 (12th ed. 2015) ("[P]ermitting a party to short-circuit available procedures for discretionary interlocutory review of certification decisions would render those procedures largely obsolete.").

III. Respondents' Voluntary Dismissal With Prejudice Following Denial of Class Certification Is Not a Final Decision Under 28 U.S.C. § 1291.

Respondents' position threatens to undermine more than just the effectiveness and ongoing viability of Rule 23(f). The Ninth Circuit concluded that, notwithstanding the interlocutory nature of class certification decisions, the district court's ruling was reviewable under 28 U.S.C. § 1291 following respondents' voluntary dismissal with prejudice. *Baker v. Microsoft Corp.*, 797 F.3d 607, 612 (9th Cir. 2015). The Second Circuit—the one other court of appeals that has held that a plaintiff may force

appellate review of a class certification decision by precipitating a dismissal with prejudice—likewise based its conclusion on § 1291. *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 178-79 (2d Cir. 1990). As these cases demonstrate, accepting the voluntary dismissal option would not only subvert the balance this Court established when it promulgated Rule 23(f); it would also erode § 1291's finality principle and the underlying policy against piecemeal appeals.

Section 1291 provides for appellate jurisdiction over "final decisions" of the district courts. The Court has long held that a final decision "is not a technical concept of temporal or physical termination." *Cobbledick v. United States*, 309 U.S. 323, 326 (1940). The inquiry into finality is informed by practical considerations aimed at "achieving a healthy legal system." *Id.* In determining whether an order is final under § 1291, this Court looks to the underlying goals of "prevent[ing] the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974).

For example, when the Court has allowed appeals of certain "collateral orders," it has described that practice "not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it." *Dig. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). And it has limited the "small category" of appealable collateral orders to "only decisions that are

conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action"—a high bar that the denial of class certification does not meet. *Swint*, 514 U.S. at 42; *Mohawk Indus.*, 558 U.S. at 105. All the while, the Court has reiterated the need to enforce § 1291's finality requirement to promote "efficient judicial administration" and to avoid "encroach[ing] upon the prerogatives of district court judges." *Id.* at 106.

Consistent with the Court's "practical construction" of § 1291, it has examined assertions of finality in the context of existing avenues for interlocutory review. In rejecting the argument that class certification rulings are final decisions in *Livesay*, this Court recognized the availability of 28 U.S.C. § 1292(b) as an avenue for (permissive) interlocutory appeals. It explained that § 1292(b) "was enacted to meet the recognized need for prompt review of certain nonfinal orders." 437 U.S. at 474. The Court refused to allow the established procedures for interlocutory appeal to be "circumvent[ed]." *Id.* at 475. The availability of interlocutory review thus informed the Court's application of § 1291.

More recently, *Swint v. Chambers County Commission* underscored that § 1291's finality requirement may not be interpreted in a way that allows parties to circumvent the existing procedures for interlocutory appeal. 514 U.S. at 43-51. In *Swint*, the Eleventh Circuit had exercised pendent appellate jurisdiction over certain nonfinal decisions. *Id.* at 43-44. This Court vacated for lack of jurisdiction. *Id.* at 51. In doing so, it noted that the procedures for

interlocutory review set forth in § 1292 were "[o]f *prime significance to the jurisdictional issue before*" the Court. *Id.* at 46 (emphasis added). To allow the Eleventh Circuit's expansion of appellate jurisdiction would be to "drift away from the statutory instructions Congress has given to control the timing of appellate proceedings." *Id.* at 45.

The procedures for interlocutory review established by Rule 23(f) are entitled to the same weight in resolving the jurisdictional issue presented here. As noted, Rule 23(f) was promulgated under § 1292(e), which authorizes this Court to "prescribe rules ... to provide for an appeal of an interlocutory decision" not otherwise appealable under § 1292. Through § 1292(e), Congress designated "the rulemaking process as the way to define or refine when a district court ruling is 'final' and when an interlocutory order is appealable." *Swint*, 514 U.S. at 48. As this Court has explained, "the rulemaking process has important virtues. It draws on the collective experience of bench and bar, and it facilitates the adoption of measured, practical solutions." *Mohawk Indus.*, 558 U.S. at 114 (citation omitted).

Rule 23(f) is emblematic of the measured, practical solutions that can emerge from the rulemaking process. The provision balances the value of interlocutory review of class certification decisions against the costs of indiscriminate interlocutory appeals. That balance "warrants the Judiciary's full respect," *Swint*, 514 U.S. at 48, and any further expansion of a party's right to appeal a class

certification decision should occur through the rulemaking process, not through a court decision.

CONCLUSION

This Court should vacate the judgment of the Court of Appeals for lack of appellate jurisdiction.

Respectfully submitted,

Robert M. Loeb
Thomas M. Bondy
Randy J. Kozel
Randall C. Smith
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005

E. Joshua Rosenkranz
Counsel of Record
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5380
jrosenkranz@orrick.com

March 18, 2016

RECORD
AND
BRIEFS

No. 15-457

IN THE
Supreme Court of the United States

MICROSOFT CORPORATION,
Petitioner,

v.

SETH BAKER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of Complex Litigation Law Professors as Amici Curiae in Support of Respondents

RISHI BHANDARI
Counsel of Record
MANDEL BHANDARI LLP
80 Pine Street
33rd Floor
New York, NY 10005
(212) 269-5600
rb@mandelbhandari.com
Counsel for Amici Curiae

May 23, 2016

QUESTION PRESENTED

Whether a federal court of appeals has jurisdiction under both Article III and 28 U.S.C. § 1291 to review an order denying class certification after the named plaintiffs voluntarily dismiss their claims with prejudice.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. ARTICLE III TAKES INTO ACCOUNT THE FUNCTION OF THE CLASS ACTION 4

A. The function of the class action is to enable litigation for numerous plaintiffs who each lack an incentive to bring an individual claim against a common defendant. 5

B. The class action enables small claims litigation against a common defendant through cost sharing, attorney's fee awards for the class attorney, and incentive awards for the class representative. 10

C. The function of the class action informs whether the named parties have a sufficient stake for purposes of Article III 14

II. ARTICLE III DOES NOT BAR THE RESPONDENTS' APPEAL 21

A. The respondents have a sufficient stake in the litigation for purposes of Article III. 21

B. Revising the law of justiciability would be inappropriate given this record. 24

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Amchem Prods., Inc. v. *Windsor*, 521 U.S. 591 (1997) 7, 8, 12
Amgen, Inc. v. *Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013) 8
Baker v. *Carr*, 369 U.S. 186 (1962) 20, 23
Butler v. *Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013) 8
Campbell-Ewald Co. v. *Gomez*, 136 S. Ct. 663 (2016) 17
Clapper v. *Amnesty Int'l USA*, 568 U.S. ---, slip op. (U.S. Sup. Ct. 2013) 23
Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978) . 7
Deposit Guar. Nat'l Bank v. *Roper*, 445 U.S. 326 (1980) ..... passim
Eisen v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974)6, 7
Espenscheid v. *DirectSat USA, LLC*, 688 F.3d 872 (7th Cir. 2012) 12, 13, 22
Gascho v. *Global Fitness Holdings, LLC*, --- F.3d ---, 2016 WL 2802473 (6th Cir. May 13, 2016) 9
Genesis Healthcare Corp. v. *Symczyk*, 133 S. Ct. 1523 (2013) 19, 25
Gonzales v. *Cassidy*, 474 F.2d 67 (5th Cir. 1973) 13
In re Am. Express Merchants' Litig., 634 F.3d 187 (2011) 8
In re Microsoft Xbox Scratched Disc Litig., No. C07-1121, 2009 WL 10219350 (W.D Wash. Oct. 5, 2009) 21

Lewis v. *Cont'l Bank Corp.*, 494 U.S. 472 (1990)..... 19
Mace v. *Van Ru Credit Corp.*, 109 F.3d 338 (7th Cir. 1997) 8, 12
Rand v. *Monsanto Co.*, 926 F.2d 596 (7th Cir. 1991), *overruled on other grounds by Chapman* v. *First Index, Inc.*, 796 F.3d 783 (7th Cir. 2015)..... 11
Spokeo, Inc. v. *Robins*, No. 13-1339, slip op. (U.S. Sup. Ct. May 16, 2016)..... 18, 23
Sprint Commc'ns Co. v. *APCC Servs., Inc.*, 554 U.S. 269 (2008) 22
U.S. Parole Comm'n v. *Geraghty*, 445 U.S. 388 (1980) 14, 16, 17, 18
United States v. *Proctor & Gamble Co.*, 356 U.S. 677 (1958) 24
United States v. *Windsor*, 133 S. Ct. 2675 (2013)... 20, 23
Vermont Agency of Natural Resources v. *United States ex rel. Stevens*, 529 U.S. 765 (2000)..... 22
Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) 5

OTHER AUTHORITIES

1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS (5th ed. 2011)..... 10
2 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS (6th ed. 2010)..... 12

Administrative Conference of the United States, *Aggregate Agency Adjudication*, Final Report (May 3, 2016), *available at* https://www.acus.gov/report/aggregate-agency-adjudication-final-report 9

AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010) 10

Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497 (1969). 6

David Rosenberg & Kathryn E. Spier, *Incentives to Invest in Litigation and the Superiority of the Class Action*, 6 J. LEG. ANALYSIS 305 (2014) 12

David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393 (2000) 11

Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941). 5

Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73 (2007) 20

Sergio J. Campos, *Class Actions and Justiciability*, 66 FLA. L. REV. 553 (2014) 22

Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. REV. 1303 (2006) 13

RULES

Fed. R. Civ. P. 23 .....passim

INTEREST OF AMICI CURIAE

The *amici* are law professors who teach and write in the field of federal civil procedure and complex litigation. *Amici* share an interest in presenting this Court with an impartial view on the function of the class action and its relationship to the law of Article III justiciability to inform the question presented in this case.[1] The complete list of signatories is as follows:

Sergio J. Campos, Associate Professor of Law, University of Miami School of Law;

Robin J. Effron, Professor of Law, Brooklyn Law School;

Suzette M. Malveaux, Professor of Law, The Catholic University of America, Columbus School of Law;

---

[1] No counsel for a party authored this brief in whole or in part. No person other than amicus curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties' consented to the filing of this brief. All parties' consented to the filing of this brief and written documentation of their consent is being submitted concurrently.

Alan B. Morrison, Lerner Family Associate Dean for Public Interest & Public Service Law, George Washington University Law School;

David Rosenberg, Lee S. Kreindler Professor of Law, Harvard Law School;

Howard M. Wasserman, Professor of Law, Florida International University College of Law;

Stephen I. Vladeck, Professor of Law, American University Washington College of Law; and

Adam S. Zimmerman, Professor of Law, Loyola Law School, Los Angeles.

SUMMARY OF ARGUMENT

As interested professors of the law of complex litigation, we submit this *amici curiae* brief to clarify the function of the class action and how it has informed, and should continue to inform, the law of justiciability under Article III.

The function of the class action is to enable litigation for a class of individuals who each lack an economic incentive to bring their individual claims against a common defendant. The class action does so by (1) allocating the costs of investments in common issues among the class members, (2) using attorney's fee awards to motivate the class attorney to invest in common issues, and (3) providing incentive awards to class representatives to ensure they adequately represent the class, and in turn, conserve judicial resources by promoting the finality of any class judgment.

Because of these features of the class action, this Court has long recognized that the representative parties of a proposed class action retain a sufficient stake for Article III purposes to appeal the denial of class certification even when they lack an interest in their own individual claims. In short, the operation of the class action ensures that the objectives of the law of justiciability are met.

Microsoft does not challenge this well-settled area of law, but asks the Court to create a new exception.

Microsoft contends that this case is not justiciable because the respondents voluntarily dismissed their lawsuit. Petitioners' Br. at 34-41. Adopting the distinction that Microsoft offers—that a class representative cannot appeal the denial of class certification if she voluntarily dismisses her action—would introduce needless confusion into the law of Article III justiciability. This is especially true given the record in this case, where it is doubtful that the named parties have voluntarily dismissed their individual claims.

Accordingly, we urge this Court to refrain from upsetting this area of the law of justiciability and to conclude that the respondents' appeal of the denial of class certification is justiciable under Article III.

ARGUMENT

I. ARTICLE III TAKES INTO ACCOUNT THE FUNCTION OF THE CLASS ACTION.

This Court has consistently taken into account the function of the class action in determining whether the named parties seeking to represent a class have a sufficient stake in the litigation for purposes of Article III. As discussed in more detail below, this Court has considered the named parties' separate interest in representing the class, as well as the operation of the class action, in determining whether the requirements of Article III are satisfied.

A. The function of the class action is to enable litigation for numerous plaintiffs who each lack an incentive to bring an individual claim against a common defendant.

From the beginning, the modern class action has been understood as a procedure to allow numerous claimants to bring claims against a common defendant that are otherwise too small to be litigated separately. Shortly after promulgation of the first Federal Rules of Civil Procedure in 1938, the initial version of Rule 23 was recognized by scholars as a vehicle to "explore the possibilities of revitalizing private litigation to fashion an effective means of group redress." *See* Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 687 (1941). Specifically, the class action was seen as a solution to the problem of individuals who are "in no position to act for themselves because of . . . the disproportion between the expense of seeking redress and their individual stake in the controversy." *Id.* at 714.

This view of the function of the class action became enshrined in the Federal Rules of the Civil Procedure through the 1966 amendments to Rule 23. The 1966 amendments, which in large part continue to apply, created a new category of class actions which could be brought if common issues of law and fact "predominate[d]" the litigation and the class

action was "superior" to alternatives. Fed. R. Civ. P. 23(b)(3); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011).

The Rule 23(b)(3) category was created as a residual category to "encompass[] those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Fed. R. Civ. P. 23(b)(3) advisory committee's note to 1966 amendment. But one express objective of the new category was to permit class actions of damage claims that were too small to be brought separately. As put by the reporter for the 1966 Amendments, the Rule 23(b)(3) category was designed "to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. Rev. 497, 497 (1969).

This Court acknowledged this "effective strength" function of the class action shortly after passage of the 1966 Amendments which created Rule 23(b)(3). In *Eisen* v. *Carlisle & Jacquelin*, for example, the Court reviewed the certification of a class action involving the antitrust and securities claims of numerous odd-lot traders against two odd-lot dealers who handled 99% of all odd-lot trades at the time.

417 U.S. 156, 160 (1974). Each claim was small, with the named plaintiff seeking only $70. *Id.* at 161. The *Eisen* Court noted that "[n]o competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all." *Id.*

Four years later, in *Coopers & Lybrand* v. *Livesay*, this Court rejected the "death knell" doctrine, which permitted plaintiffs to appeal the denial of class certification when the denial effectively ended the litigation. 437 U.S. 463, 470 (1978). In rejecting the "death knell" rule, however, the Court did not "question[] th[e] assumption" that gave rise to the rule: "that without the incentive of a possible group recovery the individual plaintiff may find it economically imprudent to pursue his lawsuit to a final judgment and then seek appellate review of an adverse class determination." *Id.* at 469-70.

This Court has since expressly highlighted the function of the class action in enabling the litigation of numerous small claims against a common defendant. For example, in *Amchem Prods., Inc.* v. *Windsor*, which concerned a global class action settlement of asbestos claims, the Court stated unequivocably that:

> The policy at the very core of the class action mechanism is to overcome the problem that

> small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.

521 U.S. 591, 617 (1997) (quoting *Mace* v. *Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

Recently, this Court again pointed out this "policy at the very core of the class action mechanism." *Amgen, Inc.* v. *Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1202 (2013) (quoting *Amchem*). In doing so, the Court stressed that securities fraud class actions "are an essential supplement to criminal prosecutions and civil enforcement actions." *Id.* at 1201 (citations omitted).

Indeed, the small claims function of the class action is universally accepted by the Courts of Appeals. To borrow the colorful language of the Seventh Circuit, class actions are necessary to enable numerous small claims to be filed against a common defendant because, in the absence of a class action, "only a lunatic or a fanatic sues for $30." *Butler* v. *Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013) (citations omitted). Other Circuit Courts have made the same or similar observations about the need for class actions in small claims litigation. *Accord In re Am. Express Merchants' Litig.*, 634 F.3d 187, 194 (2d Cir. 2011).

In fact, as recently noted by the Sixth Circuit, "one of the purposes of consumer class actions" like the one brought by respondents in this case "is the need to insure that mistreatment of consumers will not be insulated because the damage suffered by an individual consumer is too small to justify the expense and time required to challenge the practice." *Gascho* v. *Global Fitness Holdings, LLC*, --- F.3d ---, 2016 WL 2802473 at *13 (6th Cir. May 13, 2016).

Even outside of Article III courts, class actions and other forms of aggregation have proven invaluable in legislative courts and administrative agencies to "improve access to legal and expert assistance by parties with limited resources, so that individuals can pursue claims that otherwise would be difficult to pursue on an individual basis." Administrative Conference of the United States, *Aggregate Agency Adjudication*, Final Report, 59 (May 3, 2016), *available at* https://www.acus.gov/report/aggregate-agency-adjudication-final-report.

B. The class action enables small claims litigation against a common defendant through cost sharing, attorney's fee awards for the class attorney, and incentive awards for the class representative.

Three features of the class action enable the litigation of numerous small claims against a common defendant. *First*, the class action "aggregat[es] many individual claims into a single suit and distribut[es] the costs of representation across the entire claimant group." 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 1:7 (5th ed. 2011). By imposing the sharing of common costs among the numerous class members, the class action reduces the cost for *each* member of investing in an issue common to the class.

Second, the class action provides an economic incentive to the class attorney to invest in common issues for the benefit of the class members. This incentive is created by the potential attorney's fee award, which is typically calculated as a percentage of the total class recovery. *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.13 cmt. b (2010) (noting the preference for "the percentage method" among courts).

Although such attorney's fee awards can be controversial given their large size, their size is necessary to provide a sufficient incentive to invest in common issues. For example, assume that an expert necessary to prove a common issue of liability would cost $10,000, which would preclude a plaintiff from suing if she only had a claim worth $100. Even if this cost is shared among 10,000 class members with similar $100 claims, a class representative would still be dissuaded from investing the entire amount up front. *See Rand* v. *Monsanto Co.*, 926 F.2d 596, 599 (7th Cir. 1991), *overruled on other grounds by Chapman* v. *First Index, Inc.*, 796 F.3d 783 (7th Cir. 2015) ("The very feature that makes class treatment appropriate—small individual stakes and large aggregate ones—ensures that the representative will be unwilling to vouch for the entire costs."). However, the class attorney has an incentive to invest in the $10,000 expert because her own recovery would be a percentage of the total class recovery (10,000 x $100, or $1 million), thus making an investment in such an expert worthwhile. David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393, 399–400 (2000) (providing a similar example).

Ensuring that the class attorney has a sufficient incentive to invest in common issues is crucial because the defendant already has a sufficient incentive to make similar investments. In the

example above, the defendant faces the prospect of $1 million in liability, regardless of whether the litigation proceeds as a class action or not. *See* David Rosenberg & Kathryn E. Spier, *Incentives to Invest in Litigation and the Superiority of the Class Action*, 6 J. LEG. ANALYSIS 305, 306 (2014). For that reason, this Court has stressed that the class action "solves this problem" of asymmetric stakes "by aggregating the relatively paltry potential recoveries into *something worth someone's (usually an attorney's) labor*." *Amchem*, 521 U.S. at 617 (quoting *Mace* v. *Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)) (emphasis added)).

Third, the class action typically provides an incentive award to the class representatives to ensure they adequately represent the class, which, in turn, promotes the finality of any class judgment. *See Espenscheid* v. *DirectSat USA, LLC*, 688 F.3d 872, 874-75 (7th Cir. 2012) (citing 2 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 6:27 at 137–42 (6th ed. 2010)). An incentive award compensates for such risks as "liab[ility] for the defendant's costs or even, if the suit is held to have been frivolous, for the defendant's attorneys' fees." *Espenscheid*, 688 F.3d at 876. It also compensates for non-monetary risks, such as the time, inconvenience and reputational costs that representatives assume on behalf of other class members. Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to*

Class Action Plaintiffs: An Empirical Study, 53 UCLA L. REV. 1303, 1305 (2006).

In some cases, class representatives also must appeal—even after their individual claims are satisfied—to prevent a collateral attack on the final judgment and, thus, conserve judicial resources. *Gonzales* v. *Cassidy*, 474 F.2d 67, 73 (5th Cir. 1973) (finding judgment did not bind the class after the class representative did not appeal after obtaining full relief for himself, but only retrospective relief for the class members); *see also Espenscheid*, 688 F.3d at 876 ("[J]udicial economy will rarely be served by preventing the settling plaintiff from appealing."). Indeed, recent amendments to Rule 23 make clear that "[w]hether or not formally designated interim counsel, an attorney who acts on behalf of the class before certification must act in the best interests of the class as a whole." Fed. R. Civ. P. 23, advisory committee notes to the 2003 amendments (discussing Fed. R. Civ. P. 23(g)(2)). These amendments strongly imply that the class representative *also* has a duty to adequately represent the class prior to class certification.

C. The function of the class action informs whether the named parties have a sufficient stake for purposes of Article III.

This Court has discussed the role that the function of the class action plays in determining Article III justiciability in two cases decided the same day: *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326 (1980) and *U.S. Parole Comm'n* v. *Geraghty*, 445 U.S. 388 (1980). In both cases the Court stressed (1) the importance of the interests created by the class action and (2) the operation of the class action mechanism in determining whether the named parties have a sufficient stake for purposes of Article III.

In *Roper*, for example, the named parties of a proposed class action asserting credit card claims sought to appeal the denial of class certification. 445 U.S. at 327-328. However, the defendants contended that the case was moot because they offered to pay the named parties' claims in full, an offer the parties rejected. *Id.* at 329-30.

In reviewing the mootness issue, the *Roper* Court "beg[a]n by identifying the interests to be considered when questions touching on justiciability are presented in the class-action context." *Id.* at 331. These interests included both the interest the named plaintiffs had in their own claims, and "their related

right as litigants in a federal court to employ in appropriate circumstances the procedural device of a Rule 23 class action to pursue their individual claims." *Id.*

In discussing the distinct interest the parties have in employing the class action, the Court pointed to the function of the class action in enabling the litigation of small claims against a common defendant. Specifically, the *Roper* Court noted:

> The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

445 U.S. at 339.

With this function in mind, the Court concluded that the rejected offer did not "moot[] the plaintiffs' claim on the merits so long as they retained an economic interest in class certification." *Id.* at 332-33. In particular, the Court credited the plaintiffs' asserted "desire to shift part of the costs of litigation to those who will share in its benefits if the class is

certified and ultimately prevails." *Id.* at 336. Indeed, the *Roper* Court further noted that the "[t]he prospect of such fee arrangements offers advantages for litigation by named plaintiffs in class actions as well as for their attorneys." *Id.* at 338. Accordingly, in permitting the appeal to go forward, the *Roper* Court recognized the distinct economic interests created by the class action to perform its function.

This Court reached a similar result in *Geraghty*, but focused less on the economic interests created by the class action and more on the operation of the class action itself. There the Court addressed whether the named representative party of a class action asserting prisoners' claims could appeal the denial of class certification even though his own claim was mooted by his release. 445 U.S. at 394. As in *Roper*, the *Geraghty* Court discussed the function of the class action, highlighting "[t]he justifications that led to the development of the class action," which "include[d] . . . the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims." 445 U.S. at 402-03 (citing Fed. R. Civ. P. 23, advisory committee notes to the 1966 amendments).

The *Geraghty* Court concluded that the named party could appeal the denial of class certification despite his mooted claim because "[t]he proposed

representative retains a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined." *Id.* at 404. Unlike in *Roper*, the *Geraghty* Court did not rely upon the economic interests that the class action created for the named plaintiff, but on the interest in representing the class itself.

But the Court did not rely *solely* on the named party's interest in representing the class. The Court further noted that, in the context of a class action, "vigorous advocacy can be assured through means other than the traditional requirement of a 'personal stake in the outcome.'" *Id.* Implicit in the *Geragthy* Court's conclusion is a recognition that the operation of the class action can assure "vigorous advocacy" by imposing cost sharing, incentivizing the class attorney, and providing incentives to the class representatives.

This Court continues to adhere to *Roper* and *Geraghty*. This term, in *Campbell-Ewald Co.* v. *Gomez*, the Court addressed a similar situation to the one in *Roper*—whether a representative can appeal the denial of class certification when presented with an offer of judgment that would satisfy his entire claim. 136 S. Ct. 663, 668 (2016). As in *Roper*, the plaintiff in *Campbell-Ewald* did not accept the offer. *Id.* This Court concluded that because the offer was not accepted, there remained adversity because "Gomez gained no entitlement to

the relief Campbell previously offered" and, accordingly, "both retained the same stake in the litigation they had at the outset." *Id.* at 670-71. The Court did not discuss *Roper*, but it did not have to. In *Campbell-Ewald*, the named parties had a sufficient personal interest in their own claims to obviate any need to examine the interests the class action creates.

Even more recently, in *Spokeo, Inc.* v. *Robins*, this Court addressed whether a party had alleged a sufficient "injury-in-fact" to appeal the denial of class certification. No. 13-1339, slip op. (U.S. Sup. Ct. May 16, 2016) . In *Spokeo*, this Court noted in a footnote

> "[T]hat a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong.'"

Id. at 6-7 n.6 (quoting *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 40 n.20 (1976)).

This observation in *Spokeo* does not undermine either *Roper* or *Geraghty*. In both *Roper* and *Geraghty* the Court did not make a "class action" exception to the law of standing, as the named parties in both *Roper* and *Geraghty* were, in fact,

injured. *See Roper*, 445 U.S. at 332 ("[The named parties'] complaint asserted that they had suffered actual damage as a result of illegal acts of the bank. The complaint satisfied the case-or-controversy requirement of Art. III of the Constitution."); *Geraghty*, 445 U.S. at 404 n.11 ("This respondent suffered actual, concrete injury as a result of the putatively illegal conduct, and this injury would satisfy the formalistic personal-stake requirement if damages were sought."). Instead, in both *Roper* and *Geraghty*, the Court looked to the function of the class action to determine whether the stakes were sufficient to permit the litigation to *continue*, and in both cases the Court looked to the function of the class action to determine what those stakes were.[2]

---

[2] In a recent, non-class action case, *Genesis Healthcare Corp.* v. *Symczyk*, the Court did question in a footnote the viability of *Roper* given recent precedent that has held "that "[an] interest in attorney's fees is . . . insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." 133 S. Ct. 1523, 1532 n.5 (2013) (citing *Lewis* v. *Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990)).

However, the concern expressed in *Symczyk* is misplaced. As noted above, the class action does not manufacture justiciability but enables the litigation of already justiciable claims. Moreover, and as *Symczyk* itself acknowledged, the class action does more than simply create an interest in attorney's

(*Footnote continued*)

More importantly, the interests created by a class action are designed not to manufacture a justiciable controversy where none exists, but to ensure sufficient incentives to litigate in an *already justiciable case*. In fact, the class action fulfills the core Article III objective of ensuring "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *United States* v. *Windsor*, 133 S. Ct. 2675, 2687 (2013) (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)); *see also* Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 87 & n.86 (2007) ("Cases using this quotation . . . are legion").

That "concrete adverseness" is precisely what the class action is designed to create. It provides economic incentives to both the class representative and the class attorney to litigate and develop claims that otherwise would never be brought. It is the operation of the class action in motivating the litigation of small claims that explains why the Court

---

fees, as it also permits the named party "to shift a portion of attorney's fees *and expenses* to successful class litigants." 133 S. Ct. at 1532 (emphasized added). Indeed, this Court in *Roper* specifically credited the plaintiff's "desire to shift part of the *costs* of litigation to those who will share in its benefits if the class is certified and ultimately prevails." 445 U.S. at 336 (emphasis added).

in *Geraghty* stated that, in the class action context, "vigorous advocacy can be assured through means other than the traditional requirement of a 'personal stake in the outcome.'" 445 U.S at 404.

II. ARTICLE III DOES NOT BAR THE RESPONDENTS' APPEAL.

A. The respondents have a sufficient stake in the litigation for purposes of Article III.

The respondents' appeal is justiciable once the function of the class action is properly taken into account. In this case the respondents brought suit in 2011 against Microsoft shortly after a class action asserting similar claims was denied certification. *See In re Microsoft Xbox Scratched Disc Litig.*, No. C07-1121, 2009 WL 10219350 (W.D Wash. Oct. 5, 2009) (J.A. 21-24). Based on that earlier denial, the district court struck the class allegations contained in the respondents' complaint, which effectively served as a denial of class certification. (J.A. 88-99). After the respondents' unsuccessfully sought interlocutory appeal of the denial of class certification, *see* Fed. R. Civ. P. 23(f), the respondents then voluntarily dismissed their lawsuit to allow them to appeal the denial of class certification.

Despite the dismissal of their lawsuit, this Court still possesses jurisdiction over the respondents'

appeal under Article III. As in *Roper*, the respondents still retain a separate interest in representing the class which includes an economic interest in sharing costs. 445 U.S. at 336. Moreover, and unlike in *Roper*, the respondents also retain an interest in receiving an incentive award for serving as class representatives. Respondents' Br. at 53 ("[R]espondents may eventually obtain an 'incentive award' for winning efforts.").

In fact, the possibility of an incentive award strengthens the respondents' personal stake for Article III purposes. This is because the class representative's interest in an incentive award is akin to the interest of the relator in a qui tam action, who has a partial interest in the recovery despite not being injured. This Court has recognized the relator's partial interest in the recovery as sufficient for purposes of Article III. *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765, 772–73 (2000); *see also Sprint Commc'ns Co.* v. *APCC Servs., Inc.*, 554 U.S. 269, 271 (2008) (concluding that an assignee of the right to bring a claim has standing under Article III). The class representative's interest in an incentive award is similar because "[i]f a class is certified and is awarded a judgment or settlement, the named plaintiffs will be in effect partial assignees of the money awarded the class.' *Espenscheid*, 688 F.3d at 876; *cf.* Sergio J. Campos, *Class Actions and Justiciability*, 66 FLA. L. REV. 553, 591-92 (2014)

(analogizing interest in class action award to interest of relator in a qui tam action).

Finally, permitting the respondents to appeal the denial of class certification would not undermine the policies that underlie the law of Article III justiciability. This Court has recently emphasized the importance of Article III in maintaining the separation of powers, as it "serve[s] to prevent the judicial process from being used to usurp the powers of the political branches." *Spokeo*, slip. op. at 6 (quoting *Clapper* v. *Amnesty Int'l USA*, 568 U.S. ---, slip op. at 9 (U.S. Sup. Ct. 2013)). However, "[t]his concern is generally absent when a private plaintiff seeks to enforce only his personal rights against another party." *Spokeo*, slip op. at 2 (Thomas, J., concurring). Accordingly, because the respondents are private individuals seeking to enforce their personal rights in nondefective Xbox consoles against Microsoft, a private company, exercising jurisdiction in this case raises no separation of powers concerns.

Moreover, allowing the respondents to appeal would promote another important goal of the law of Article III justiciability—ensuring that "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *See United States* v. *Windsor*, 133 S. Ct. 2675, 2687 (2013) (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)).

B. Revising the law of justiciability would be inappropriate given this record.

Microsoft does not challenge *Roper* or *Geraghty*, but argue that this case is distinguishable because the respondents voluntarily dismissed their lawsuit. Petitioners' Br. at 34-40. Microsoft points to a non-class action case for the proposition that "a plaintiff who voluntarily dismissed his complaint may not [appeal from that dismissal]." *United States* v. *Proctor & Gamble Co.*, 356 U.S. 677, 680-81 (1958).

Although respondents dismissed their lawsuit, they did not forgo their right to bring a class action. In dismissing the lawsuit, the respondents here expressly stipulated their intent "to appeal the Court's March 27, 2012 Order (Dkt. 32) striking the Plaintiffs' class allegations." Pet. App. 39a (quoting J.A. 122-23). Accordingly, this case is an improper vehicle for recognizing a "voluntariness" exception to *Roper* and *Geraghty* because the respondents did not voluntarily dismiss their interest in litigating a class action. Under both *Roper* and *Geraghty*, that interest is sufficient alone to support Article III justiciability.

Adopting the distinction that Microsoft offers—that a class representative cannot appeal the denial of class certification if she voluntarily dismisses her claim—may also introduce needless confusion into the law of Article III justiciability. Whether a

representative in fact voluntarily dismissed her claim will not always be cut and dried.

This is especially true here, where it is doubtful from the record that the respondents waived their claims *at all*. Specifically, in dismissing their lawsuit, the parties stipulated that the dismissal "was not filed pursuant to a settlement agreement" and, while dismissing their claims with prejudice, the respondents did reserve their right to re-assert their own claims should the denial of class certification be reversed. Pet. App. 36a.

This Court has wisely declined to revisit the settled principles established in *Roper* and *Geraghty* given the record in other recent cases. *See Campbell-Ewald*, 136 S. Ct. at 672 (declining to address "hypothetical" situation not before court); *Symczyk*, 133 S. Ct. at 1529, 1532 & n.5 (2013) (declining to revisit *Roper*, concluding that both *Roper* and *Geraghty* "are inapposite . . . because these cases are, by their own terms, inapplicable to these facts"). The Court should similarly decline to create a new "voluntariness" exception given the murky record here.

CONCLUSION

As set forth above, the Court should affirm the judgment of the Court of Appeals as justiciable under Article III.

Respectfully submitted,

RISHI BHANDARI
Counsel of Record
MANDEL BHANDARI LLP
80 Pine Street
33rd Floor
New York, NY 10005
(212) 269-5600
rb@mandelbhandari.com
Counsel for Amici Curiae

May 23, 2016

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
MAR 17 2016
OFFICE OF THE CLERK

No. 15-457

In the
Supreme Court of the United States

MICROSOFT CORPORATION,
Petitioner,
v.
SETH BAKER, ET AL.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR DRI – THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* SUPPORTING PETITIONER

LAURA E. PROCTOR
President of DRI— The Voice of the Defense Bar
55 W. Monroe St.
Suite 2000
CHICAGO, IL 60603

MARY MASSARON
Counsel of Record
HILARY A. BALLENTINE
PLUNKETT COONEY
38505 Woodward Avenue
Suite 2000
Bloomfield Hills, MI 48304
(248) 901-4000
mmassaron@plunkettcooney.com

Counsel for Amicus Curiae DRI – The Voice of the Defense Bar

March 17, 2016

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 6

I A Tactic That Allows Plaintiffs To Manufacture Interlocutory Appellate Jurisdiction To Obtain Review Of A Class-Certification Denial - And To Do So By Employing Voluntary Dismissal Tactics Without Consequence – Ignores The Effect Of A Dismissal With Prejudice, Runs Directly Afoul Of The Discretion Given To The Appellate Courts To Hear Interlocutory Certification Appeals, And Distorts The Balance Of The Civil Justice System. 6

A. When A Plaintiff Makes The Strategic Decision To Voluntarily Dismiss Part Or All Of His Claims With Prejudice In Order To Achieve Finality And Take An Immediate Appeal, He Cannot Revive The Dismissed Claims. 6

B. The Ninth Circuit's Decision Inures Only To The Benefit Of Class Plaintiffs, Thus Distorting The Balance Of The Civil Justice System And Placing Unfair Pressures On Defendants. 12

C. The Discretion To Immediately Review A Non-Final Certification Decision Belongs To The Appellate Courts, Not Class Plaintiffs. 17

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Air Wisconsin Airlines Corp. v. Hoeper,
134 S. Ct. 852 (2014) 1

Alamance Indus., Inc. v. Filene's,
291 F.2d 142 (1st Cir. 1961) 17

Baker v. Microsoft Corp.,
797 F.3d 607 (9th Cir. 2015) 21, 22

Baltimore Contractors v. Bodinger,
348 U.S. 176 (1955), *overruled other gds*,
Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988) 20

Berger v. Home Depot USA, Inc.,
741 F.3d 1061 (9th Cir. 2014) 21

Camesi v. Univ. of Pittsburgh Med. Ctr.,
729 F.3d 239 (3d Cir. 2013) 6, 10

Campbell-Ewald Co. v. Gomez,
136 S. Ct. 663 (2016) 1

Catlin v. United States,
324 U.S. 229, 233 (1945) 17

Chamberlan v. Ford Motor Co.,
402 F.3d 952 (9th Cir. 2005) 5, 20

Cohen v. Beneficial Industrial Loan Corp.,
337 U.S. 541 (1949) 11

Comcast Corp. v. Behrend,
133 S. Ct. 1426 (2013) 1

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) 4, 12, 18, 19, 20, 21

Dalton v. Lee Publications, Inc.,
625 F.3d 1220 (9th Cir. 2010) 2

Dannenberg v. Software Toolworks,
16 F.3d 1073 (9th Cir. 1994)..... 6

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974)..... 16, 18

Empire Volkswagen Inc. v. World-Wide Volkswagen Corp.,
814 F.2d 90 (2d Cir. 1987)..... 8, 9

Fairley v. Andrews,
578 F.3d 518 (7th Cir. 2009)..... 6, 8

Firestone Tire & Rubber Co. v. Risjord,
449 U.S. 368 (1981)..... 18

Gulfstream Aerospace Corp. v. Mayacamas Corp.,
485 U.S. 271 (1988)..... 20

Heimeshoff v. Hartford Life Acc. Ins. Co.,
134 S. Ct. 604 (2013)..... 1

International Marketing, Ltd. v. Archer-Daniels-Midland Co.,
192 F.3d 724 (7th Cir. 1999)..... 7

Matter of Rhone-Poulenc Rorer, Inc.,
51 F.3d 1293 (7th Cir. 1995)..... 15, 16

Parkinson v. April Industries, Inc.,
520 F.2d 650 (2d Cir. 1975)..... 21

Parko v. Shell Oil Co.,
739 F.3d 1083 (7th Cir. 2014)..... 14

Thorogood v. Sears, Roebuck and Co.,
547 F.3d 742 (7th Cir. 2008)..... 15

U.S. v. Windsor,
133 S. Ct. 2675 (2013)..... 7

Wal-Mart Stores, Inc. v. Dukes,
131 S. Ct. 2541 (2011) 1

Court Rules

Federal Rule of Civil Procedure 23 ..... 2, 20
Federal Rule of Civil Procedure 23(e) 17
Federal Rule of Civil Procedure 23(f) .. 2, 4-5, 9, 13-16 20-22
Federal Rule of Civil Procedure 41(a) 3, 4, 21
Federal Rule of Civil Procedure 41(a)(1) 7, 16
Federal Rule of Civil Procedure 41(a)(2) 9
Federal Rule of Civil Procedure 66 17
Supreme Court Rule 37.3 1
Supreme Court Rule 37.6 1

Statutes

28 U.S.C. § 1291 ..... 4, 8, 18, 19, 21
28 U.S.C. § 1292 18
28 U.S.C. § 1292(b) 2, 18
28 U.S.C. § 1292(e) 20
31 U.S.C. § 3730(b)(1) 17
42 U.S.C. § 1983 10
False Claims Act 17

Miscellaneous

5 Moore, Federal Practice P41.05 (2d ed. 1951) 17
Advisory Committee Notes to 1998 Amendments, Subdivision (f) 2, 20

Barry F. McNiel, *et. al.*, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 489-90 (updated 8/5/96) 15

Barry Sullivan & Amy Kobeleski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 278 (2008) 14

Christopher A. Kitchen, *Interlocutory Appeal of Class Action Certification Decisions Under Federal Rule of Civil Procedure 23(f): A Proposal For A New Guideline*, COLUM. BUS. L. REV. 231, 232 (2004) 14

Henry J. Friendly, *Federal Jurisdiction: A General View*, 120 (1973) 16

Kenneth S. Gould, *Federal Rule of Civil Procedure 23(f): Interlocutory Appeals of Class Action Certification Decisions*, 1 J. App. Prac. & Process, 309, 312 (1999) 14

Michael B. Barnett, *The Plaintiffs' Bar Cannot Enforce the Laws: Individual Reliance Issues Prevent Consumer Protection Classes in the Eighth Circuit*, 75 MO. L. REV. 207, 208 (Winter 2010) 16

Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 99 (2009) 15

Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1291-92 (2002) 15

S. REP. NO. 109-15, 17 2021 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 21 16

Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?* 81 NOTRE DAME L. REV. 591, 647 (2006) *15

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI – The Voice of the Defense Bar, is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to promote the role of defense attorneys, to address issues germane to defense attorneys and their clients, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient. See http://www.dri.org/About. To promote these objectives, DRI participates as amicus curiae in cases that raise issues important to its membership, their clients, and the judicial system. See, e.g., *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016); *Air Wisconsin Airlines Corp v. Hoeper*, 134 S. Ct. 852 (2014); *Heimeshoff v. Hartford Life Acc. Ins. Co.*, 134 S. Ct. 604 (2013); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). This is one of those cases.

---

[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties has consented to this filing.

DRI has a strong interest in ensuring that the rules of civil procedure are consistently and fairly enforced in order to provide a fair and balanced civil justice system rather than circumvented - as demonstrated in this case – where class plaintiffs who were unsuccessful in seeking Rule 23(f) interlocutory review voluntarily dismiss their case with prejudice in order to manufacture finality for purposes of forcing the appellate court to consider the class certification decision at the outset. This tactic is not available to defendants when class certification is granted, and thus results in a one-way avenue for an appeal. And equally problematic, it allows appeals from decisions that fail the test for interlocutory review under Rule 23(f) and 28 U.S.C. § 1292(b). Thus, the Ninth Circuit's decision directly affects the fair, efficient, and consistent functioning of our civil justice system. As such, it is of vital interest to the members of DRI.

When proposed classes fail to satisfy the generally applicable requirements of Federal Rule of Civil Procedure 23 for adjudicating the claims of many different persons at once, class certification is denied. Plaintiffs can then petition "for *permission*" to appeal the adverse class certification decision under Rule 23(f), which grants the appellate courts discretion in determining whether to grant interlocutory appellate review of a district court order granting or denying certification. Advisory Committee Note (1998); *Dalton v. Lee Publications, Inc.*, 625 F.3d 1220, 1221 (Judge O'Scannlain, dissenting) (9th Cir. 2010).

DRI has a unique vantage point to help this Court understand the importance of proper adherence to the outer bounds of the appellate courts' jurisdiction over class certification decisions, not only from a legal standpoint, but also from practical and economic standpoints as well. DRI's members regularly must defend their clients against class suits in a wide variety of contexts. Accordingly, DRI, alone and in conjunction with other legal organizations, has conducted seminars studying these lawsuits long before this case. DRI has also compiled a Class Action Compendium designed to provide civil defense lawyers and corporate counsel with an understanding of the intricacies of class action practice and procedure. These and other seminars and writings on class action litigation reveal DRI's longstanding interest in mass action litigation. DRI has also submitted testimony regarding the federal rules of civil procedure, potential legislation relating to class actions, and other issues arising from class action litigation.

Based on its members' extensive practical experience, DRI is uniquely suited to explain why the better approach is to adopt a rule that does not permit a plaintiff to manufacture appellate jurisdiction to review a class-certification denial by the stratagem of voluntarily dismissing all claims only to revive them if the appeal is successful.

SUMMARY OF THE ARGUMENT

The decision below implicates the effect of a voluntary dismissal with prejudice. When used appropriately, a voluntary dismissal with prejudice under Federal Rule of Civil Procedure 41(a) can

streamline litigation, allowing plaintiffs to forgo weak claims in order to make the judgment final and thus obtain immediate review of the retained claims. The trade-off for this stratagem is the inability to revive the dismissed claims. But while a voluntary dismissal with prejudice is ordinarily understood to result in the discharge of those claims "forever", respondents use it here simply to manufacture appellate jurisdiction to obtain review of an interlocutory order, with an open avenue to revive those dismissed claims at a later date. The Ninth Circuit's allowance of this tactic reflects a grave misunderstanding of the nature of a dismissal with prejudice. Not only does this tactic infringe on the final judgment rule, 28 U.S.C. § 1291, and call into question whether the plaintiffs are "aggrieved," it also promotes piecemeal appeals, especially when one considers how plaintiffs could use this tactic to obtain review of the many interlocutory orders entered in the typical case outside the class action context.

Moreover, the "maneuver" permitted by the Ninth Circuit benefits plaintiffs only. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). There is no analogous Rule 41(a) option available to defendants. However, the class certification issue is equally important to plaintiffs *and* defendants. *Id.* The Ninth Circuit's decision therefore provides class plaintiffs a procedural advantage, distorting the balance of the civil justice system and the court's attempt to maintain that balance through the enactment of Federal Rule of Civil Procedure 23(f) – which places plaintiffs and defendants on equal footing by giving the courts of appeals the discretion to permit an immediate appeal of a class certification

decision. The Ninth Circuit's decision completely eviscerates that discretion by placing class plaintiffs in the driver's seat and allowing them, and not the judiciary, to determine when to take an immediate appeal of a class certification denial. This runs directly afoul of the legislative intent of Rule 23(f), which was to make interlocutory appeals "the exception rather than the rule." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005).

If the Ninth Circuit's decision is left to stand, the clients that DRI's members regularly defend will face a number of hard, unfair choices. Defendants will be forced to settle once a class pursues this strategy, or defend a full-fledged appeal of the class certification decision which does not even begin to address the merits of the claims. The possibility of reversal of the district court's denial of class certification may also improperly inflate the value of the case, creating a "blackmail" settlement. Careful adherence to Rule 23(f) guards against these ills by creating a balance that permits interlocutory appellate review of class certification decisions but only when the court of appeals determines that an immediate appeal is appropriate.

For these reasons, DRI urges this Court to reverse the Ninth Circuit's decision.

ARGUMENT

I A Tactic That Allows Plaintiffs To Manufacture Interlocutory Appellate Jurisdiction To Obtain Review Of A Class-Certification Denial - And To Do So By Employing Voluntary Dismissal Tactics Without Consequence – Ignores The Effect Of A Dismissal With Prejudice, Runs Directly Afoul Of The Discretion Given To The Appellate Courts To Hear Interlocutory Certification Appeals, And Distorts The Balance Of The Civil Justice System.

A. When A Plaintiff Makes The Strategic Decision To Voluntarily Dismiss Part Or All Of His Claims With Prejudice In Order To Achieve Finality And Take An Immediate Appeal, He Cannot Revive The Dismissed Claims.

The Ninth Circuit decision essentially allows plaintiffs to manufacture finality and force an immediate appeal of an order denying class certification simply by voluntarily dismissing their claims with prejudice. The very core of the Ninth Circuit's position "reflects a fundamental misunderstanding of the nature of a dismissal with prejudice." *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 247 (3d Cir. 2013). Once a plaintiff voluntarily dismisses his or her claims with prejudice, those claims "are gone forever" – in other words, "not reviewable" by the appellate court and not permitted to be "recaptured at the district court level." *Id.*, citing *Fairley v. Andrews*, 578 F.3d 518, 522 (7th Cir. 2009) and *Dannenberg v. Software*

Toolworks, 16 F.3d 1073, 1077 (9th Cir. 1994). This comports with the rule that a party must be "aggrieved" by a district court judgment or order in order to have standing to appeal. *U.S. v. Windsor*, 133 S. Ct. 2675, 2687 (2013). In its simplest terms, appellate review is reserved for a losing party seeking reversal of an adverse decision. It is not intended to be used by a plaintiff who has gripes with an interlocutory ruling but nonetheless agrees to dismiss his own case with prejudice. In that situation, the plaintiff is no longer an "aggrieved party" entitled to obtain appellate review.

Parties regularly dismiss counts of a complaint, theories of the case, or entire complaints on a voluntary basis. Federal Rule of Civil Procedure 41(a)(1) allows for this. But the traditional understanding is that once a plaintiff has done so, those claims are gone forever. This is the "gamble" litigants take "when they ask a district court to dismiss live claims with prejudice so they can pursue an immediate appeal...[the plaintiff] must live with the consequences of the final judgment it requested." *International Marketing, Ltd. v. Archer-Daniels-Midland Co.*, 192 F.3d 724,733 (7th Cir. 1999). In short, a litigant cannot have his cake and eat it too.

This conundrum can arise in several different contexts. A plaintiff may decide to dismiss all claims with prejudice to allow an immediate appeal even if the trial court dismissed the complaint in its entirety but granted leave to amend some of the allegations. This was the factual scenario in *International Marketing*. The Seventh Circuit succinctly noted that this strategic decision –"necessary to secure appellate

jurisdiction under 28 U.S.C. § 1291" – is not without consequence:

> Of course, a final judgment is just that. [The plaintiff's] strategic decision meant that its case can be resuscitated only if it is able to convince this court that it had in fact properly stated one or more of its claims, in the form they took before the district court in the unamended complaint. Taking an immediate appeal was thus a calculated risk, at least if [the plaintiff] thought that some of the less favored claims were nonetheless salvageable by amendment. But this is the way [the plaintiff] chose to litigate[.]

Id. at 727.

Another, more typical scenario involves a plaintiff's conscious decision to abandon one claim in order to obtain finality and appellate review of an adverse decision on another claim. In this case, "if plaintiff loses on A and abandons B in order to make the judgment final and thus obtain immediate review, the court will consider A, but B is lost forever." *Fairley v. Andrews*, 578 F.3d 518, 522 (7th Cir. 2009). The Second Circuit's decision in *Empire Volkswagen Inc. v. World-Wide Volkswagen Corp.*, 814 F.2d 90 (2d Cir. 1987), neatly illustrates this principle. In *Empire Volkswagen*, the district court granted summary judgment against plaintiff on some of its theories, entering an order that also resolved some of the issues on the theories that remained open for trial. *Id.* at 93-94. Concluding that the remaining theories were "unduly limited" by the district court's order such that there was insufficient

evidence to proceed to trial, the plaintiff sought and obtained an order dismissing all of the remaining claims and granting the defendant's counterclaims, pursuant to Rule 41(a)(2). *Id.* However, while this tactic permitted the plaintiff to secure review of the matters actually decided on the motion for summary judgment, the *Empire Volkswagen* Court held that matters that had remained open for trial and were resolved only by the voluntary dismissal were abandoned. In the Second Circuit's view, nothing "justif[ied] deviation from the general rule that an appeal from a judgment entered upon a voluntary dismissal with prejudice does not bring up for review any matters that were voluntarily dismissed." *Id.* at 94. In so ruling, the Second Circuit noted that this case well-illustrated "[t]he danger inherent in electing voluntarily to dismiss a case because of a prior adverse ruling[.]" *Id.* at 95. The trade-off for the right of immediate appeal of a partial summary judgment order is clear: the litigant loses any and all claims not resolved by the court but voluntarily dismissed at the litigant's request.

Here, the district court's denial of class certification had nothing do with the merits of Respondents' claims. Yet Respondents made the calculated decision to voluntarily dismiss the entirety of their claims with prejudice in an effort to manufacture finality and force immediate appellate review of the class certification decision (having first been unsuccessful in obtaining interlocutory appellate review under Rule 23(f)). Under the principles discussed above, Respondents cannot "revive" their now-dismissed individual claims on remand, as they contend they may do if successful on

appeal. Br. in Opp. 16, n. 4. This would completely undermine the traditional understanding of a voluntary dismissal with prejudice and allow plaintiffs to act without consequence and dismiss and revive their claims at will.

If such a tactic were permitted in the class action context, it would certainly be used by plaintiffs in a multitude of other contexts as well. As the Third Circuit aptly noted, if courts "were to allow such a procedural sleight-of-hand to bring about finality," then "nothing [would] prevent [plaintiffs] from employing such a tactic to obtain review of discretionary orders, evidentiary rulings, or any of the myriad decisions a district court makes before it reaches the merits" of the case. *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 245-46 (3d Cir. 2013). Absent a reversal, the Third Circuit's fear would be realized. Take, for example, a motion in limine filed by the defendant in a 42 U.S.C. § 1983 action to preclude an expert's testimony and granted by the district court. Under the tactic allowed by the Ninth Circuit, nothing would prevent the unsatisfied plaintiff from voluntarily dismissing the entirety of her claims with prejudice - even though the motion in limine did not reach the merits of the case - simply to obtain an immediate appeal and only to argue that the dismissed claims are revived on remand. The number of interlocutory orders entered in the typical case underscores the many piecemeal appeals that could occur if plaintiffs are able to use such a strategy without consequence.

Moreover, if this tactic were to be allowed, it would dramatically alter the careful balance of

available appeals that is embodied in the rules, both those governing civil procedure at the district court level and those governing appellate jurisdiction. Currently, the general rule is that an appeal as a matter of right occurs only after a final judgment. Carefully drawn exceptions exist as a matter of statute and court rule or their interpretation in doctrines such as the *Cohen* collateral order doctrine. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-546 (1949). But these limits would be jeopardized if the Ninth Circuit's decision is upheld.

The Ninth Circuit's rule might also have consequences in the circumstances of removal and remand jurisdiction. It is not uncommon for defendants to seek and obtain the plaintiff's voluntary dismissal of federal claims in exchange for a remand that allows the plaintiff to litigate in the state court forum he initially chose. If voluntary dismissal is deemed to be subject to revocation on remand, what is there to stop a plaintiff from voluntarily dismissing federal claims, only to revive them down the road should the state court forum not prove to be as favorable as the plaintiff initially believed? This could either result in protracted litigation through two court systems or discourage defendants from making the initial agreement to pursue only the state claims in the state court.

The use of voluntary dismissals can achieve a salutary result in many cases; but the Ninth Circuit decision threatens its proper use. A rule that allows a plaintiff to manufacture finality by abandoning all remaining parts of his case, but which also forbids any attempt to recapture the abandoned claims, is an

efficient and proper use of the voluntary dismissal mechanism. If the court of appeals affirms, there is no need for a trial as the case is concluded. If the district court's ruling is reversed, the resultant trial on remaining theories will likely be more efficient. *Id.* However, allowing an appeal to proceed as the Ninth Circuit's decision does will undermine the rule of law, cause grave confusion to litigants trying to resolve and terminate litigation as to some theories or issues, and result in increased appellate litigation asking courts to overturn dismissals entered into by agreement.

B. The Ninth Circuit's Decision Inures Only To The Benefit Of Class Plaintiffs, Thus Distorting The Balance Of The Civil Justice System And Placing Unfair Pressures On Defendants.

The practical ramifications of the Ninth Circuit's decision on the businesses and individuals DRI's members regularly defend in class suits support the Court's reversal. The decision below turns class action rules on their head and imposes economic and other improper strains on defendants. It does so in two major ways:

First, the Ninth Circuit's decision creates a one way-street which "operates only in favor of plaintiffs[.]" *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). It is well-settled that only plaintiffs can opt to voluntarily dismiss their cases under Rule 41(a). Defendants have no such right; they can only be dismissed by the plaintiff or the court. However, the certification issue "will often be of critical importance to defendants as well." *Id.* In short,

"[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle the case and to abandon a meritorious defense." *Id.* Accordingly, the Ninth Circuit's decision gives class plaintiffs a procedural "leg up" in that it allows them to immediately appeal an order denying class certification, but disallows defendants from immediately appealing an order certifying a class unless the court of appeals exercises its discretion under Rule 23(f) to consider the appeal on an interlocutory basis.

The fairer rule, and the one DRI urges this Court to adopt, is that both plaintiffs *and* defendants seeking review of a class certification decision before entry of a final judgment must proceed under Rule 23(f). If the court of appeals declines to exercise its discretionary jurisdiction under Rule 23(f), then there will be no appellate review of the certification decision – at least not until the district court issues a final decision. This puts class plaintiffs and defendants on a level playing field and restores the equity component built into Rule 23(f), which allows appeals "from an order granting *or* denying class-action certification under this rule..." Federal Rule of Civil Procedure 23(f) (emphasis added). Of course, litigants may propose revisions to Rule 23(f) through the rule-making process to provide for an automatic appeal of a certification decision, whether it is granted or denied, which would provide the same even-handed approach to the appeal of a decision regarding certification.

Second, the realized threat of not one, but two bites at the proverbial appellate apple (exemplified here, where Respondents first sought and were denied interlocutory appellate review under Rule 23(f) and then voluntarily dismissed their claims with prejudice and took an appeal) will force defendants into high-dollar settlements even if a meritorious defense exists. Even in the ordinary course, the grant or denial of a motion for class certification is a defining moment in the class action. Barry Sullivan & Amy Kobeleski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 278 (2008) ("Arguably, the most critical stage in a class action is the point at which the court decides whether to certify the class."); Christopher A. Kitchen, *Interlocutory Appeal of Class Action Certification Decisions Under Federal Rule of Civil Procedure 23(f): A Proposal For A New Guideline*, COLUM. BUS. L. REV. 231, 232 (2004) ("A court's decision whether to certify a class is often the decisive moment in a class action...."); KENNETH S. GOULD, 1 J. APP. PRAC. & PROCESS, 309, 312 (1999) ("The decision is often crucial....[it] can have a life or death impact on the course of class action litigation...."); *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014) ("the unwieldiness, the delay, and the danger that class treatment would expose the defendant or defendants to settlement-forcing risk are not costs worth incurring."). The certification decision becomes even more significant and protracted in light of the Ninth Circuit's allowance of an immediate appeal from an order denying class treatment. Thus, even if the district court denies class certification and the court of appeals denies the

plaintiffs' request for review under Rule 23(f), the tactic permitted by the Ninth Circuit will require defendants to spend considerable resources to defend a full-fledged appeal of the class certification decision before even beginning to litigate the merits of the claims.

This will place intense pressure on defendants to settle, even if an adverse judgment ultimately seems "improbable." See *Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742, 745 (7th Cir. 2008); *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). See also Barry F. McNiel, *et. al.*, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 489-90 (updated 8/5/96). It is common knowledge that "the vast majority of certified class actions settle, most soon after certification." Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1291-92 (2002) ("[E]mpirical studies ... confirm what most class action lawyers know to be true."); see also Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 99 (2009) ("With vanishingly rare exception, class certification [leads to] settlement, not full-fledged testing of the plaintiffs' case by trial."); Thomas E. Willging & Shannon R. *15 Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?* 81 NOTRE DAME L. REV. 591, 647 (2006) ("[A]lmost all certified class actions settle."). Even where the district court denies class certification and the court of appeals declines to review that decision under Rule 23(f), the threat of defending an additional appeal may tip the scales towards

settlement. If allowed to stand, the Ninth Circuit's decision will only exacerbate these problems and proliferate more of these "blackmail settlements." *Rhone*, *supra* at 1298, citing Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). Simply put, "[s]uch leverage can essentially force corporate defendants to pay ransom..." S. REP. NO. 109-15, 17 2021 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 21; Michael B. Barnett, *The Plaintiffs' Bar Cannot Enforce the Laws: Individual Reliance Issues Prevent Consumer Protection Classes in the Eighth Circuit*, 75 MO. L. REV. 207, 208 (Winter 2010).

Careful adherence to the finality requirement and Rule 23(f) serves to guard against the ills set forth above. Appeals of class certification decisions brought after exhaustion of Rule 23(f)'s remedy using the mechanism of a voluntary dismissal harm the civil justice system, both because they create enormous litigation costs with no attendant benefit and because the appeals destabilize the carefully-calibrated equilibrium the rules were designed to create. They also foster inefficiency by allowing "piecemeal appeal disposition[,]" which in turn creates a "debilitating effect on judicial administration[.]" *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974). And, as discussed above, the strain this places on the individuals and businesses that DRI's members are regularly called on to defend cannot be overstated.

This will turn the concept of voluntary dismissal on its head and require increased court intervention. Already, in some contexts– including if a class has

been certified – court approval is required for a voluntary dismissal under Rule 41(a)(1). See, e.g., Federal Rule of Civil Procedure 23(e) (requiring court approval for voluntary dismissal of "[t]he claims, issues, or defenses of a certified class"); Federal Rule of Civil Procedure 66 (requiring a court order to dismiss any action in which a receiver has been appointed); 31 U.S.C. § 3730(b)(1) (plaintiffs cannot dismiss an action brought under the False Claims Act unless "the court and the Attorney General give written consent to the dismissal and their reasons for consenting."). The primary purpose of requiring a court order in such circumstances is "to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions." *Alamance Indus., Inc. v. Filene's*, 291 F.2d 142, 146 (1st Cir. 1961), citing 5 MOORE, FEDERAL PRACTICE P41.05 (2d ed. 1951). Stated another way, while the voluntary dismissal mechanism serves laudable goals – including saving the courts and parties time and money and aiding in the efficient operation of the civil justice system – it can undermine the legal system if used as a tool to obtain an appeal of a non-final issue that was decided prior to the agreement to voluntarily dismiss the case. This is precisely what the Ninth Circuit's decision threatens to accomplish.

C. The Discretion To Immediately Review A Non-Final Certification Decision Belongs To The Appellate Courts, Not Class Plaintiffs.

Federal appellate jurisdiction generally depends on the existence of a *final* decision "which ends the

litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Catlin v. United States*, 324 U.S. 229, 233 (1945). The finality requirement serves an important purpose: preventing "the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974).

The courts of appeals are statutorily granted jurisdiction to consider appeals "from all final decisions" of the district courts. 28 U.S.C. § 1291. Because "the finality requirement embodied in § 1291 is jurisdictional in nature[,i]f the appellate court finds that the order from which a party seeks to appeal does not fall within the statute, its inquiry is over." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981). Limited statutory exceptions to the finality requirement, set forth in 28 U.S.C. § 1292, are typically inapplicable to orders denying class certification, except in the rare case where the district court determines that the order involves a "controlling question of law as to which there is substantial ground for difference of opinion," in which case the courts of appeals have discretion to permit an interlocutory appeal. 28 U.S.C. § 1292(b). This is because "[a]n order refusing to certify, or decertifying, a class does not of its own force terminate the entire litigation because the plaintiff is free to proceed on his individual claim." *Livesay*, 437 U.S. at 467.

In *Livesay*, the Court held that "orders relating to class certification are not independently

appealable under § 1291 prior to judgment" – even if the prejudgment order denying class certification would sound the "death knell" of the class action. *Id.* at 470. The "death knell" doctrine "assumes that without the incentive of a possible group recovery the individual plaintiff may find it economically imprudent to pursue his lawsuit to a final judgment and then seek appellate review of an adverse class determination." *Id.* at 469-70. Writing for a unanimous Court, Justice Stevens rejected the death knell doctrine as a means to manufacture finality, announcing that "the fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering it a 'final decision' within the meaning of § 1291." *Id.* at 477. In so doing, the *Livesay* Court recognized that the "death knell" doctrine creates a one-way street for plaintiffs to obtain appellate jurisdiction of prejudgment orders denying class certification:

> First, the doctrine operates only in favor of plaintiffs even though the class issue—whether to certify, and if so, how large the class should be—will often be of critical importance to defendants as well. Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense. Yet the Courts of Appeals have correctly concluded that orders granting class certification are interlocutory. Whatever similarities or differences there are between plaintiffs and defendants in this

> context involve questions of policy for Congress.

Id. at 476. The Court was therefore mindful that any "choice" concerning whether to extend or reduce jurisdiction "falls in the legislative domain." *Baltimore Contractors v. Bodinger*, 348 U.S. 176, 181 (1955), *overruled other gds, Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988).

After *Livesay*, Congress enacted 28 U.S.C. § 1292(e), which authorized the Supreme Court to "prescribe rules...to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for...." The Supreme Court's response in the class action context was to adopt Federal Rule of Civil Procedure 23(f), which authorizes a court of appeals to permit a timely "appeal from an order granting or denying class-action certification[.]" Federal Rule of Civil Procedure 23(f). *Id.* The Advisory Committee Notes to Rule 23(f) make clear that the drafters intended the courts of appeals to enjoy discretion to grant or deny permission to appeal "based on any consideration the court of appeals finds persuasive." Federal Rule of Civil Procedure 23, Advisory Committee Notes to 1998 Amendments, Subdivision (f).

The Ninth Circuit's decision runs directly afoul of Rule 23(f) and the discretion given to the courts of appeals to grant or deny interlocutory review of class certification orders. As the Ninth Circuit itself has observed, "the drafters [of Rule 23(f)] intended interlocutory appeal to be the exception rather than the rule." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005). But the Ninth Circuit's

decision directly contradicts its prior recognition that "petitions for Rule 23(f) review should be granted sparingly." *Id.* Perhaps best explained in *Livesay*, the Ninth Circuit's decision "thrusts appellate courts indiscriminately into the trial process and thus defeats one vital purpose of the final-judgment rule-'that of maintaining the appropriate relationship between the respective courts. . . [a] goal, in the absence of most compelling reasons to the contrary... very much worth preserving.'" *Livesay*, 437 U.S. at 476, quoting *Parkinson v. April Industries, Inc.*, 520 F.2d 650, 654 (2d Cir. 1975). The rule adopted by the Ninth Circuit completely erodes this balance by permitting non-final decisions to act as final decisions through strategic appeal tactics – tactics rejected by this Court. 437 U.S. at 476-77.

In short, the Ninth Circuit's ruling in this case distorts the carefully-calibrated balance of Rule 23(f) by eliminating all discretion granted to the courts of appeals to determine those select class certification decisions that warrant interlocutory review. It does so by allowing plaintiffs to invoke the voluntary dismissal rule, Federal Rule of Civil Procedure 41(a), to "manufacture" finality by stipulating to dismiss their claims with prejudice and forcing an appeal of the class certification decision. *Baker v. Microsoft Corp.*, 797 F.3d 607 (9th Cir. 2015). In the Ninth Circuit's view, plaintiffs can invoke the court of appeals' jurisdiction under § 1291 "because a dismissal of an action with prejudice, even when such dismissal is the product of a stipulation, is a sufficiently adverse – and thus appealable – final decision." *Id.* at 612, quoting *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1065 (9th Cir. 2014). The

Ninth Circuit's decision makes no attempt to limit the circumstances under which plaintiffs can force jurisdiction upon the appellate court, even though the plaintiffs in that case were previously unsuccessful in seeking interlocutory appellate review under Rule 23(f). *Baker*, *supra*, at 611.

Nor does the Ninth Circuit explain how a party which voluntarily agrees to dismiss its claims with prejudice can be aggrieved. Once this principle is adopted, there is no end to the circumstances in which appellate interlocutory jurisdiction may be manufactured. If left to stand, appellate courts will no longer control their discretionary jurisdiction because the plaintiffs will be able to achieve interlocutory review by this stratagem.

The Ninth Circuit's decision creates grave problems in the effectuation of current rules governing interlocutory jurisdiction, voluntary dismissals, and aggrieved parties. It conflicts with longstanding notions of each of these concepts. And it poses the risk of severe practical problems. For these reasons, a reversal is in order.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

LAURA E. PROCTOR
President of
DRI— The Voice
of the Defense Bar
55 W. Monroe St.
Suite 2000
CHICAGO, IL 60603

MARY MASSARON
Counsel of Record
HILARY A. BALLENTINE
PLUNKETT COONEY
38505 Woodward Avenue
Suite 2000
Bloomfield Hills, MI 48304
(248) 901-4000
mmassaron@plunkettcooney.com

Counsel for Amicus Curiae DRI – The Voice of the Defense Bar

March 17, 2016

RECORD AND BRIEFS

SUPREME COURT, U.S.
FILED
MAR 17 2016
OFFICE OF THE CLERK

No. 15-457

In the
Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

v.

SETH BAKER, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

DEBORAH J. LA FETRA
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: DLaFetra@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

QUESTION PRESENTED

Whether a federal court of appeals has jurisdiction under both Article III and 28 U.S.C. § 1291 to review an order denying class certification after the named plaintiffs voluntarily dismiss their individual claims with prejudice.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. A PLAINTIFF WHO DISMISSES WITH PREJUDICE LACKS ARTICLE III STANDING TO APPEAL A CLASS CERTIFICATION DENIAL 3

A. Denial of Class Certification Has No Bearing on the Merits or Plaintiff's Legal Ability to Proceed 4

B. A Purported Class Representative's Claims Rise and Fall with His Individual Claims 7

II. POLICY CONSIDERATIONS FAVOR EXTENSION OF *LIVESAY* TO DISMISSALS WITH PREJUDICE 10

A. Procedural Rules Should Not Encourage Litigation Gamesmanship 10

B. The Interests of Plaintiffs' Counsel Cannot Be Imputed to the Plaintiffs Themselves 15

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Cases

Airframe Systems, Inc. v. Raytheon Co.,
601 F.3d 9 (1st Cir. 2010) 13

Allen v. Bedolla,
787 F.3d 1218 (9th Cir. 2015) 16

Amchem Prods. v. Windsor,
521 U.S. 591 (1997) 17

American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013) 6

Anderson v. CNH U.S. Pension Plan,
515 F.3d 823 (8th Cir. 2008) 11

Ariz. Christian Sch. Tuition Org. v. Winn,
563 U.S. 125 (2011) 19

Arizonans for Official English v. Arizona,
520 U.S. 43 (1997) 3

AT&T Mobility LLC v. Concepcion,
563 U.S. 333 (2011) 17

Bailey v. Patterson, 369 U.S. 31 (1962) 9

Baker v. Microsoft Corp.,
797 F.3d 607 (9th Cir. 2015) 2

Bennett v. Spear, 520 U.S. 154 (1997) 1

Bode & Grenier, LLP v. Knight,
808 F.3d 852 (D.C. Cir. 2015) 14

Bowles v. Russell, 551 U.S. 205 (2007) 10

Budinich v. Becton Dickinson & Co.,
486 U.S. 196 (1988) 12

TABLE OF AUTHORITIES—Continued

Page

Camesi v. Univ. of Pittsburgh Med. Ctr.,
729 F.3d 239 (3d Cir. 2013) 9, 13

Campbell-Ewald Co. v. Gomez,
136 S. Ct. 663 (2016) 3, 7

Camreta v. Greene, 131 S. Ct. 2020 (2011) 3

Chapman v. Procter & Gamble Distributing, LLC,
766 F.3d 1296 (11th Cir. 2014) 13

Collins v. Miller,
252 U.S. 364 (1920) 10

Contractors Edge, Inc. v. City of Mankato,
863 N.W.2d 765 (Minn. 2015) 14

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) 2-3, 6, 10-11, 17

Dannenberg v. Software Toolworks,
16 F.3d 1073 (9th Cir. 1994) 9

Daubert v. Merrell Dow Pharmaceuticals, Inc.,
509 U.S. 579 (1993) 12-13

Deposit Guaranty Nat'l Bank v. Roper,
445 U.S. 326 (1980) 5, 7, 11

Dickinson v. Petroleum Conversion Corp.,
338 U.S. 507 (1950) 14

Empire Volkswagon, Inc. v.
World Wide Volkswagon Corp.,
814 F.2d 90 (2d Cir. 1987) 4-5

Espenscheid v. DirectSat USA, LLC,
688 F.3d 872 (7th Cir. 2012) 16

TABLE OF AUTHORITIES—Continued

Page

Fairley v. Andrews,
578 F.3d 518 (7th Cir. 2009) 9

First American Financial Corp. v. Edwards,
132 S. Ct. 2536 (2012) 1

FTC v. Garvey, 383 F.3d 891 (9th Cir. 2004) 13

Genesis Healthcare Corp. v. Symczyk,
133 S. Ct. 1523 (2013) 4, 7

Gerstein v. Pugh, 420 U.S. 103 (1975) 8

Grupo Dataflux v. Atlas Global Grp., L.P.,
541 U.S. 567 (2004) 12

Hackett v. General Host Corp.,
455 F.2d 618 (3d Cir.),
cert. denied, 407 U.S. 925 (1972) 15

Hall v. State Farm Mut. Auto. Ins. Co.,
215 Fed. Appx. 423 (6th Cir. 2007) 15

Himler v. Comprehensive Care Corp.,
790 F. Supp. 114 (E.D. Va. 1992),
appeal dismissed,
993 F.2d 1537 (4th Cir. 1993) 7-8

Hollingsworth v. Perry,
133 S. Ct. 2652 (2013) 3-4

In re Community Bank of Northern Virginia,
418 F.3d 277 (3d Cir. 2005) 15

Laczay v. Ross Adhesives,
855 F.2d 351 (6th Cir. 1988),
cert. denied, 489 U.S. 1014 (1989) 4

Laird v. Tatum, 408 U.S. 1 (1972) 4

TABLE OF AUTHORITIES—Continued

Page

Lewis v. Casey, 518 U.S. 343 (1996) 5

Lewis v. Cont'l Bank Corp.,
494 U.S. 472 (1990) 17

Local No. 438 Constr. and General Laborers' Union, AFL-CIO v. Curry,
371 U.S. 542 (1963) 4

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 1

Maguire v. Sandy Mac, Inc.,
145 F.R.D. 50 (D.N.J. 1992) 7

Massachusetts v. E.P.A., 549 U.S. 497 (2007) 1

Mohawk Indus., Inc. v. Carpenter,
558 U.S. 100 (2009) 10

Muro v. Target Corp.,
580 F.3d 485 (7th Cir. 2009) 11

Newton v. Merrill Lynch,
259 F.3d 154 (3d Cir. 2001) 17

Pastor v. State Farm Mut. Auto. Ins. Co.,
487 F.3d 1042 (7th Cir. 2007) 7

Phillips v. Asset Acceptance, LLC,
736 F.3d 1076 (7th Cir. 2013) 16

Potter v. Norwest Mortgage, Inc.,
329 F.3d 608 (8th Cir. 2003) 8

Raceway Properties, Inc. v. Emprise Corp.,
613 F.2d 656 (6th Cir. 1980) 5

Raines v. Byrd, 521 U.S. 811 (1997) 2

TABLE OF AUTHORITIES—Continued

Page

Rhodes v. E.I. du Pont de Nemours & Co.,
636 F.3d 88 (4th Cir. 2011) 8

Ruppert v. Principal Life Ins. Co.,
705 F.3d 839 (8th Cir. 2013) 7

Schlesinger v. Reservists Comm. to Stop the War,
418 U.S. 208 (1974) 9

Sears, Roebuck & Co. v. Butler,
134 S. Ct. 1277 (2014) 1

Sosna v. Iowa, 419 U.S. 393 (1975) 10

Spokeo v. Robins,
No. 13-3339 (U.S. filed May 1, 2014) 1

State Treasurer of State of Michigan v. Barry,
168 F.3d 8 (11th Cir. 1999) 11-12

Summers v. Earth Island Institute,
555 U.S. 488 (2009) 1

Toms v. Allied Bond & Collection Agency, Inc.,
179 F.3d 103 (4th Cir. 1999) 4

Tyrues v. Shinsecki,
732 F.3d 1351 (Fed. Cir. 2013) 14

U.S. Parole Comm'n v. Geraghty,
445 U.S. 388 (1980) 7-9, 15

United States v. Procter & Gamble Co.,
356 U.S. 677 (1958) 8

Van Cauwenberghe v. Biard,
486 U.S. 517 (1988) 11

TABLE OF AUTHORITIES—Continued

Page

Wal-Mart Stores, Inc. v. Dukes,
131 S. Ct. 2541 (2011) 1, 5-6

White v. Baptist Mem'l Health Care Corp.,
699 F.3d 869 (6th Cir. 2012) 7

United States Constitution

U.S. Const. art. III 3, 8-9, 17, 19

U.S. Const. art. III, § 2 3

Rules of Court

Fed. R. Civ. P. 23 5-6

Fed. R. Civ. P. 23(a) 9

S. Ct. R. 37 1

S. Ct. R. 37.3(a) 1

S. Ct. R. 37.6 1

Miscellaneous

Barnette, William P.,
The Limits of Consent: Voluntary Dismissals, Appeals of Class Certification Denials, and Some Article III Problems,
56 S. Tex. L. Rev. 451 (2015) 5-6, 9-10, 17

Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative*, 1974 Duke L.J. 573 15

TABLE OF AUTHORITIES—Continued

Page

Dixon, Lloyd & Gill, Brian, RAND Inst. for Civil Justice, *Changes in the Federal Standards for Admitting Expert Evidence in Federal Civil Cases Since the Daubert Decision* (2001) 12-13

Donaldson, Jr., David H., Comment, *A Search for Principles of Mootness in the Federal Courts: Part Two—Class Actions*, 54 Tex. L. Rev. 1289 (1976) 15

Fisher, Daniel, *$7.8 Million Fee for Lawyers, 7-Cent Check for One Lucky Class Member*, FORBES, Jan. 8, 2016, http://www.forbes.com/sites/danielfisher/2016/01/08/7-8-million-fee-for-lawyers-7-cent-check-for-one-lucky-class-member/#246210ee6c61 16

Frank, Theodore D., *Requiem for the Final Judgment Rule*, 45 Tex. L. Rev. 292 (1966) 14

Hines, Laura J., *Mirroring or Muscling: An Examination of State Class Action Appellate Rulemaking*, 58 U. Kan. L. Rev. 1027 (2010) 6

Nagareda, Richard A., *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149 (2003) 18

Redish, Martin H. & Kiernan, Megan B., *Avoiding Death by a Thousand Cuts: The Relitigation of Class Certification and the Realities of the Modern Class Action*, 99 Iowa L. Rev. 1659 (2014) 16-17

TABLE OF AUTHORITIES—Continued

Page

Redish, Martin H., *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal F. 71 18

Schwartz, Joanna C., *Gateways and Pathways in Civil Procedure*, 60 UCLA L. Rev. 1652 (2013) 12

Skitol, Robert A., *The Shifting Sands of Antitrust Policy: Where It Has Been, Where It Is Now, Where It Will Be in Its Third Century*, 9 Cornell J.L. & Pub. Pol'y 239 (1999) 18

Trask, Andrew J., *The Roberts Court and the End of the Entity Theory*, 48 Akron L. Rev. 831 (2015) 7

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner, Microsoft Corp.[1] PLF was founded in 1973 and is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. PLF advocates for limited government, individual rights, and free enterprise. PLF has litigated numerous cases involving Article III standing, *see, e.g.*, *Spokeo v. Robins*, No. 13-3339 (U.S. filed May 1, 2014); *First American Financial Corp. v. Edwards*, 132 S. Ct. 2536 (2012); *Summers v. Earth Island Institute*, 555 U.S. 488 (2009); *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007); *Bennett v. Spear*, 520 U.S. 154 (1997); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), as well as cases involving class actions in federal court. *See, e.g.*, *Sears, Roebuck & Co. v. Butler*, 134 S. Ct. 1277 (2014); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

---

[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Washington-based plaintiffs sued in a purported class action alleging a design defect in Microsoft's manufacture of Xbox game consoles. The district court denied class certification and the plaintiffs filed an interlocutory appeal which, in its discretion, the Ninth Circuit denied. Rather than pursuing their individual claims, the plaintiffs voluntarily dismissed their claims with prejudice for the purpose of appealing the certification denial. *Baker v. Microsoft Corp.*, 797 F.3d 607, 609-11 (9th Cir. 2015).

In *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 466 (1978), this Court held that plaintiffs seeking review of interlocutory orders denying class certification typically must wait until after final judgment, even if the order sounds the "death knell" for the plaintiffs' claims. Since *Livesay*, five circuit courts of appeals have held that plaintiffs cannot evade *Livesay* by voluntarily dismissing their lawsuits with prejudice to force a final judgment that then becomes immediately appealable. In this case, the Ninth Circuit held to the contrary: that the plaintiffs' tactic of voluntary dismissal sufficed to create a final judgment such that the appellate court had jurisdiction to decide whether certification was properly denied or should have been granted. *Baker*, 797 F.3d at 615.

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (citation omitted). The plaintiffs' voluntary dismissal resulted in no remaining "case or controversy" necessary for jurisdiction under

Article III of the U.S. Constitution. This Court should not countenance the tactical end-run around *Livesay*.

The decision below should be reversed.

ARGUMENT

I

A PLAINTIFF WHO DISMISSES WITH PREJUDICE LACKS ARTICLE III STANDING TO APPEAL A CLASS CERTIFICATION DENIAL

Article III of the Constitution limits federal-court jurisdiction to "cases" and "controversies." U.S. Const. art. III, § 2. This constitutional boundary functions as an "essential limit on [judicial] power: It ensures that [courts] act *as judges*, and do not engage in policymaking properly left to elected representatives." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013). In so doing, the standing doctrine furthers the separation of powers defined by the Constitution. *Id.* at 2661.

A case or controversy exists when both the plaintiff and the defendant have a "personal stake" in the lawsuit. *Camreta v. Greene*, 131 S. Ct. 2020, 2028 (2011) (citation omitted). This requirement extends through the course of the entire litigation; it is not a snapshot in time, relevant only when the complaint is filed. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). When "an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be

dismissed as moot." *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013).

Whether a plaintiff has standing is a matter that courts must determine objectively. If a court's assessment of constitutional standing defers to the plaintiff's subjective assessment of the value of his case, no case would ever be dismissed on such grounds. *See Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; 'the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.'") (citation omitted); *Hollingsworth*, 133 S. Ct. at 2661. *Cf. Toms v. Allied Bond & Collection Agency, Inc.*, 179 F.3d 103, 107 (4th Cir. 1999) ("No party can create jurisdiction merely by agreement; the Constitution vests authority in the courts only where a concrete interest is present.").

A. Denial of Class Certification Has No Bearing on the Merits or Plaintiff's Legal Ability to Proceed

Article III requires that the only type of voluntary dismissal with prejudice that can be appealed is that which "effectively" dismisses a case. *See Laczay v. Ross Adhesives*, 855 F.2d 351, 354 (6th Cir. 1988) (citation omitted), *cert. denied*, 489 U.S. 1014 (1989); *Empire Volkswagon, Inc. v. World Wide Volkswagon Corp.*, 814 F.2d 90, 94 (2nd Cir. 1987). An order "effectively" dismisses a case when it affects the merits of the case or imposes a significant legal burden on the plaintiff's ability to proceed with the litigation. *See Local No. 438 Const. and General Laborers' Union, AFL-CIO v. Curry*, 371 U.S. 542, 548-49 (1963) (courts may consider jurisdictional determination whether

state courts may review a controversy within the allegedly exclusive domain of the National Labor Relations Board, a matter wholly independent of the merits that is subject to no further review in the state courts); *Empire Volkswagon*, 814 F.2d at 94 (partial summary judgment dismissing most of plaintiff's claims); *Raceway Properties, Inc. v. Emprise Corp.*, 613 F.2d 656, 657 (6th Cir. 1980) (district court's determination of relevant market for antitrust claim effectively disposed of the case because the plaintiffs could not proceed with evidence regarding the relevant market outlined by the district court).

By definition, a ruling denying class certification is procedural in nature and does not resolve the merits of the named plaintiff's individual claim. *See generally* Fed. R. Civ. P. 23 (discussing the procedural requirements for class certification); *Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("That a suit may be a class action . . . adds nothing to the question of standing . . . .") (citation and internal quotation marks omitted); *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 336 (1980) ("We view the denial of class certification as an example of a procedural ruling, collateral to the merits of a litigation, that is appealable after the entry of final judgment."); William P. Barnette, *The Limits of Consent: Voluntary Dismissals, Appeals of Class Certification Denials, and Some Article III Problems*, 56 S. Tex. L. Rev. 451, 477 (2015). Class certification decisions remain procedural in nature even though the analysis of whether a class should be certified will frequently "entail some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). The "necessity of touching aspects of the merits in order to resolve preliminary matters," such as

certification, does not mean that the merits are conclusively determined one way or the other by the resolution of the preliminary matters. *Id.* at 2552.

A court order denying class certification, therefore, has no effect on the merits of the plaintiff's claim, nor does it impose any constitutionally relevant legal impediment. *See Livesay*, 437 U.S. at 464-66 (A district court's order denying class certification is not "appealable as a matter of right," even if denial of class status sounds the "death knell" of the litigation because the named plaintiffs find it uneconomical to proceed on their individual claims.); *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309-10 (2013) (Federal Rule of Civil Procedure 23 does not establish any entitlement to class proceedings for vindication of statutory rights, even when the costs of proceeding individually are "prohibitively high.") (citation omitted). The plaintiff's individual claims remain just as they were prior to filing a motion for certification.

Moreover, denial of class certification does not necessarily render it "economically imprudent" for individual plaintiffs to pursue their case further. Barnette, *supra*, at 478 (citing Laura J. Hines, *Mirroring or Muscling: An Examination of State Class Action Appellate Rulemaking*, 58 U. Kan. L. Rev. 1027, 1032 (2010)). The cost of litigation will not always lead an unsuccessful class representative to stop litigating. *See Livesay*, 437 U.S. at 470, 471 & n.15 ("the litigation will often survive an adverse class determination . . . [given the plaintiff's] prospect of prevailing on the merits and reversing an order denying class certification."). In cases where a successful plaintiff is entitled to recover fees, the

individual litigation may well be worth pursuing. And, for those truly small dollar cases, small claims court efficiently and inexpensively fits the bill. *See Pastor v. State Farm Mut. Auto. Ins. Co.*, 487 F.3d 1042, 1047 (7th Cir. 2007); *Maguire v. Sandy Mac, Inc.*, 145 F.R.D. 50, 54 (D.N.J. 1992) (denying class certification while cautioning against "the transformation of the federal court system into a veritable small claims court").

B. A Purported Class Representative's Claims Rise and Fall with His Individual Claims

Prior to class certification, a purported class representative presents only his individual substantive claims. *Campbell-Ewald*, 136 S. Ct. at 667; Andrew J. Trask, *The Roberts Court and the End of the Entity Theory*, 48 Akron L. Rev. 831, 860 (2015) ("[A] class action is nothing more than an individual lawsuit until the time that a court certifies it as a class action."). Courts have found a secondary interest in the existence of the purported class itself, but only when the named plaintiff's substantive claims are mooted involuntarily. *See Genesis Healthcare*, 133 S. Ct. at 1530; *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 (1980); *Roper*, 445 U.S. at 330; *Ruppert v. Principal Life Ins. Co.*, 705 F.3d 839, 843 (8th Cir. 2013) (Ruppert's voluntary dismissal (relinquishment) of his individual claims renders the case moot, eliminating any party before the court with a sufficient personal stake in challenging the district court's denial of class certification.); *White v. Baptist Mem'l Health Care Corp.*, 699 F.3d 869, 878 (6th Cir. 2012) ("[A] lead plaintiff cannot be similarly situated and represent opt-in plaintiffs without a viable claim."); *Himler v. Comprehensive Care Corp.*, 790 F. Supp. 114, 116 (E.D.

Va. 1992), *appeal dismissed*, 993 F.2d 1537 (4th Cir. 1993) ("By employing this procedure to appeal the denial of their motion for class certification, plaintiffs are in effect attempting to sidestep the rule that interlocutory orders are not appealable as well as the rule that voluntary dismissals with prejudice by plaintiffs are not appealable.").

These holdings are consistent with the general rule that a party who voluntarily dismisses a claim with prejudice lacks both an injury and adversity within the meaning of Article III. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 680 (1958). There is nothing unique about the role of an unsuccessful class representative that should change the application of the general rule. *See, e.g., Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 100 (4th Cir. 2011) ("[W]hen a putative class plaintiff voluntarily dismisses the individual claims underlying a request for class certification, as happened in this case, there is no longer a 'self-interested party advocating' for class treatment in the manner necessary to satisfy Article III standing requirements."); *Potter v. Norwest Mortgage, Inc.*, 329 F.3d 608, 611-13 (8th Cir. 2003) (courts should normally dismiss an action as moot when the named plaintiff settles its individual claim and the class has not been certified).[2]

---

[2] The normal rules regarding mootness also continue to apply. *Geraghty*, 445 U.S. at 399 ("inherently transitory" claims may continue beyond the mootness of the individually named plaintiff's claim); *Gerstein v. Pugh*, 420 U.S. 103, 110-11 n.11 (1975) (holding that the claims of the unnamed members of the class are not mooted by the termination of the class representative's claims when the case addressed inherently transitory challenges to probable cause procedures).

Within the meaning of Article III there is only the class representative's individual claim that she is seeking to prove on behalf of the class. *See* Fed. R. Civ. P. 23(a) ("One or more members of a class may sue . . . as representative parties on behalf of all members . . . ."); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974) ("To have standing to sue as a class representative it is essential that a plaintiff must be part of that class, that is, he must possess the same interest and suffer the same injury shared by all members of the class he represents."); *Bailey v. Patterson*, 369 U.S. 31, 32-33 (1962) (per curiam) ("[Plaintiffs] cannot represent a class of whom they are not a part."). When a plaintiff dismisses claims with prejudice, they "are gone forever—they are not reviewable by [an appellate c]ourt and may not be recaptured at the district court level." *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 247 (3d Cir. 2013) (citing *Fairley v. Andrews*, 578 F.3d 518, 522 (7th Cir. 2009)) (a litigant's voluntary dismissal of a portion of their claims in order to secure an appeal, extinguishes those dismissed claims forever); *Dannenberg v. Software Toolworks*, 16 F.3d 1073, 1077 (9th Cir. 1994) (a party may not revive claims dismissed for the purposes of establishing a final appealable order). That is, there is no amorphous "class" claim floating free of the named plaintiff's individual claim. Barnette, *supra*, at 480.[3] As such,

---

[3] Only once certified does a class acquire a limited legal status that may be separated from the interests of the named plaintiff, that allows the class to continue with a new representative should the original named plaintiff's claim be rendered moot. *See Geraghty*, 445 U.S. at 405, 407 (the question of who would represent the class on remand is different from whether the class claim was moot). However, "that separate legal status does not

(continued...)

the plaintiff has no standing remaining to appeal the results of interlocutory motions such as a denial of class certification.

II

POLICY CONSIDERATIONS FAVOR EXTENSION OF *LIVESAY* TO DISMISSALS WITH PREJUDICE

A. Procedural Rules Should Not Encourage Litigation Gamesmanship

The general rule is that "a party is entitled to a single appeal, to be deferred until final judgment has been entered," and exceptions must "never be allowed to swallow" it. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (citation omitted). An appeal may not proceed "in fragments." *Collins v. Miller*, 252 U.S. 364, 370 (1920). In the appellate-jurisdiction context, the Court "has no authority to create equitable exceptions to jurisdictional requirements." *Bowles v. Russell*, 551 U.S. 205, 214 (2007). The final judgment rule

> emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of trial . . . . In addition, the rule is in accordance with the sensible policy of avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals

---

[3] (...continued)
somehow untether the substantive rights of the class members from the claim of the class representative." Barnette, *supra*, at 480 n.226 (citing *Sosna v. Iowa*, 419 U.S. 393, 399 (1975)).

> from the various rulings to which a litigation may give rise, from its initiation to entry of judgment.

Van Cauwenberghe v. Biard, 486 U.S. 517, 521 n.3 (1988) (citations and internal quotation marks omitted).

A plaintiff has no right to an interlocutory appeal of a denial of class certification even when the plaintiff perceives that denial to be the "death knell" of his lawsuit. *Livesay*, 437 U.S. 463. The policy reasons underlying that decision justify its broad application. Courts have refused to permit various attempts to avoid the final judgment rule with regard to class certification denials. For example, a plaintiff cannot use a settlement agreement as a springboard to appeal a class certification denial. *See Anderson v. CNH U.S. Pension Plan*, 515 F.3d 823, 827 (8th Cir. 2008) (recitation in settlement agreement that plaintiff reserves right to appeal denial of class certification not sufficient to create concrete interest in class certification issue required by *Roper*, 445 U.S. 326); *Muro v. Target Corp.*, 580 F.3d 485, 491 (7th Cir. 2009) ("A voluntary settlement by the prospective class representative often means that, as a practical matter, the settling individual has elected to divorce himself from the litigation and no longer retains a community of interests with the prospective class."). In these cases, the plaintiff must proceed with his claims and appeal the denial of class certification once the court has entered final judgment on the merits.

"Policy matters, too, in sculpting the final judgment rule." *State Treasurer of State of Michigan v. Barry*, 168 F.3d 8, 19 (11th Cir. 1999) (Cox, J., concurring). For "operational consistency and

predictability in the overall application of § 1291," this Court should adopt a bright-line rule to determine whether jurisdiction exists or not when a purported class action representative dismisses his lawsuit with prejudice for the sole purpose of creating a "final judgment." *Id.* at 21 (quoting *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988)); *Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 582 (2004) ("Uncertainty regarding the question of jurisdiction," is "particularly undesirable.").

The plaintiff's proposed exception to the final judgment rule in this case violates all established policies favoring the final judgment and avoiding piecemeal litigation. He argues that the exception is necessary to prevent his abdication of the lawsuit as uneconomical to pursue. But the potential effects of a denial of class certification are not unique to that procedural aspect of a case. An analogous situation arises when a trial court refuses to allow a party's expert witness to testify, pursuant to its gatekeeping function under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993) (A court must ensure that the expert testimony at issue "both rests on a reliable foundation and is relevant to the task at hand."). Like class certification denials, the exclusion of a plaintiff's expert may cause the plaintiff to "narrow the case, drop the case altogether, or accept a reduced settlement" and may cause the defendant to move for summary judgment; while exclusion of a defendant's expert may cause the defendant to "accept certain allegations by plaintiffs" or settle. Joanna C. Schwartz, *Gateways and Pathways in Civil Procedure*, 60 UCLA L. Rev. 1652, 1664 n.40 (2013) (citing Lloyd Dixon & Brian Gill, RAND Inst. for Civil Justice, *Changes in the Federal Standards for Admitting Expert*

Evidence in Federal Civil Cases Since the Daubert Decision 55 (2001)). And yet plaintiffs may not circumvent the need for a final judgment to appeal. *See Chapman v. Procter & Gamble Distributing, LLC*, 766 F.3d 1296, 1302 (11th Cir. 2014) (dismissing appeal of *Daubert* order for lack of standing, after parties agreed to a joint dismissal with prejudice, including a provision purportedly reserving the right to appeal the *Daubert* ruling).

Courts routinely halt attempts to circumvent fundamental procedural rules. In *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d at 245, the Third Circuit held that voluntary dismissal of individual claims constituted an impermissible attempt to manufacture finality for purposes of appeal. The court spoke of the "procedural sleight-of-hand" in harsh terms: "Appellants have attempted to short-circuit the procedure for appealing an interlocutory district court order that is separate from, and unrelated to, the merits of their case." Allowing such a maneuver, the court continued, would leave no obstacle to "prevent litigants from employing such a tactic to obtain review of discovery orders, evidentiary rulings, or any of the myriad decisions a district court makes before it reaches the merits of an action. This would greatly undermine the policy against piecemeal litigation." *Id.* at 245-46. *See also Airframe Systems, Inc. v. Raytheon Co.*, 601 F.3d 9, 14 (1st Cir. 2010) (doctrine of claim preclusion "protect[s] litigants against gamesmanship and the added litigation costs of claim-splitting, and preventing scarce judicial resources from being squandered in unnecessary litigation"); *FTC v. Garvey*, 383 F.3d 891, 900 (9th Cir. 2004) (courts discourage strategic gamesmanship in litigation that hinders case development and imposes unnecessary costs).

"Strategic or merely lazy circumventions of a legal process grounded in a sound policy have the effect of eroding the regularized, rational character of litigation to the detriment of practitioners and clients alike." *Bode & Grenier, LLP v. Knight*, 808 F.3d 852, 861 (D.C. Cir. 2015) (citation omitted).

One ironic but inevitable by-product of the plaintiffs' proposed flexible approach to finality is that litigants face the undesirable risk that failure to appeal from a particular ruling at the time of its entry could constitute a waiver of the right to appeal at the conclusion of the case. *See Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 516 (1950) (proposed intervenor "could have appealed" and the "failure to [do so] forfeits its right of review"). Lawyers unsure of the finality of the decision would appeal as a precautionary measure, even though the result is added costs and unwanted delay, disrupting the judicial process and undermining confidence in the trial court. Theodore D. Frank, *Requiem for the Final Judgment Rule*, 45 Tex. L. Rev. 292, 317 (1966). *Cf. Tyrues v. Shinsecki*, 732 F.3d 1351, 1358 (Fed. Cir. 2013) (a veteran must appeal decision of Board of Veterans' Appeals on a partial claim to avoid being barred by a rule requiring an appeal within 120 days of decision); *Contractors Edge, Inc. v. City of Mankato*, 863 N.W.2d 765, 775, 781 (Minn. 2015) (Lillehaug, J., dissenting) (a holding ostensibly to "discourage piecemeal appeals" by creating a "new, murky category of 'mostly final' judgments" will "encourage litigation over late appeals").

Moreover, if an individual plaintiff voluntarily dismisses his case with prejudice, for the purpose of appealing denial of class certification, is that plaintiff's

individual claim revived if the appellate court holds that the class should have been certified? *See, e.g.*, *Hall v. State Farm Mut. Auto. Ins. Co.*, 215 Fed. Appx. 423, 427 (6th Cir. 2007) ("[U]nnamed putative class members are not technically parties to an action prior to class certification and . . . as a consequence, [the substituted named plaintiff] was not a true party at the time that [the originally named plaintiff] filed suit."). If not, does class counsel have a right to substitute another named plaintiff of his or her choosing? *See In re Community Bank of Northern Virginia*, 418 F.3d 277, 313 (3d Cir. 2005) ("[C]ourts have recognized that class counsel do not possess a traditional attorney-client relationship with absent class members."). *Geraghty*, 445 U.S. at 407 (Even if a case or controversy continues to exist after denial of class certification, the "question of who is to represent the class is a separate issue.") (citing David H. Donaldson, Jr., Comment, *A Search for Principles of Mootness in the Federal Courts: Part Two—Class Actions*, 54 Tex. L. Rev. 1289, 1331-32 (1976)); Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative*, 1974 Duke L.J. 573, 602-08).

B. The Interests of Plaintiffs' Counsel Cannot Be Imputed to the Plaintiffs Themselves

The Third Circuit held in *Hackett v. General Host Corp.*, 455 F.2d 618, 625 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972):

> Realistically, when we are asked to grant interlocutory appellate review of an adverse class action determination we are asked to recognize a separate interest of the attorney

> sufficient to bring the class action determination within the "collateral order" doctrine, or to recognize the standing of the attorney's client to assert such an interest on his behalf. We decline to do either.

The lawyerly howls that greet the suggestion of a separate interest reveal one of the not-so-hidden truths about many class action cases: the instigators and most interested parties are not the consumers or employees or other individuals who suffered some small-dollar loss; the instigators and interested parties are the attorneys who seek to represent them for a significant cut of the settlement or eventual judgment.[4] *See Allen v. Bedolla*, 787 F.3d 1218, 1223-24 (9th Cir. 2015) (vacating settlement of uncertified class action and cautioning district court on remand to be wary of class counsels' self-interest and possible collusion); *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1080 (7th Cir. 2013) ("[C]lass action attorneys are the real principals and the class representative/clients their agents . . . .") (internal quotation marks omitted); *Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 876 (7th Cir. 2012) ("It is true that class actions are almost always the brainchild of lawyers who specialize in bringing such actions."); Martin H. Redish & Megan B. Kiernan, *Avoiding Death by a Thousand Cuts: The*

---

[4] *See* Daniel Fisher, *$7.8 Million Fee for Lawyers, 7-Cent Check for One Lucky Class Member*, FORBES, Jan. 8, 2016, http://www.forbes.com/sites/danielfisher/2016/01/08/7-8-million-fee-for-lawyers-7-cent-check-for-one-lucky-class-member/#246210ee6c61 (multiple law firms representing class action against Bank of America settled for fees equal to a quarter of the $31 million the bank agreed to pay for improper flood insurance solicitations and shared commissions; class members received only 2.28% of the improperly paid insurance premiums).

Relitigation of Class Certification and the Realities of the Modern Class Action, 99 Iowa L. Rev. 1659, 1662 (2014) ("For all practical purposes, class attorneys function as far more than class members' legal representative: [Instead,] they act as quasi-guardians or trustees on behalf of the absent class members."). The fact that plaintiffs frequently abandon cases following the denial of certification likely says more about the putative class lawyer's fee,[5] rather than the individual plaintiff's potential recovery. Barnette, *supra*, at 478 n.216 (citing *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997) ("A class action . . . aggregate[es] the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.")).

Few class actions actually proceed to judgment—the vast majority settle. "[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). This Court and others acknowledge "the risk of 'in terrorem' settlements that class actions entail." *Id.* (citations omitted). For this reason, counsel on both sides of class action litigation recognize the decision to certify as the most defining moment in the litigation. *See Livesay*, 437 U.S. at 476; *Newton v. Merrill Lynch*, 259 F.3d 154, 164 (3d Cir. 2001) (Once the class is certified, defendant companies are under "hydraulic

---

[5] A mere interest in obtaining attorneys' fees without an underlying claim does not satisfy Article III. *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990).

pressure" to settle.). "In short, class actions today serve as the procedural vehicle not ultimately for adversarial litigation but for dealmaking on a mass basis." Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149, 151 (2003).

Such litigation is thus used not primarily to redress injury but as a mechanism to "line lawyers' pockets despite the absence of any substance to the underlying allegations." Robert A. Skitol, *The Shifting Sands of Antitrust Policy: Where It Has Been, Where It Is Now, Where It Will Be in Its Third Century*, 9 Cornell J.L. & Pub. Pol'y 239, 266 (1999). These "suits are not, in any realistic sense, brought either by or on behalf of the class members," but by "private attorneys who initiate suit and who are the only ones rewarded for exposing the defendants' law violations." Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal F. 71, 77. Class members "neither make the decision to sue . . . nor receive meaningful compensation." *Id.* Rather, the prospect of significant attorneys' fees "provide[ ] the class lawyers with a private economic incentive to discover violations of existing legal restrictions on corporate behavior." *Id.*

The plaintiffs' attorneys' interest in recovering fees cannot therefore be sufficient reason for creating a broad exception to the general rule that class certification denials may be appealed only when the courts exercise their discretion to permit it.

CONCLUSION

"In an era of frequent litigation [and] class actions, . . . courts must be more careful to insist on the formal rules of standing, not less so." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011). In this case, Article III's demands and policy considerations both lead to the same result.

The decision below should be reversed.

DATED: March, 2016.

Respectfully submitted,

DEBORAH J. LA FETRA
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: DLaFetra@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

RECORD AND BRIEFS

FILED
MAR 18 2016
OFFICE OF THE CLERK

No. 15-457

IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,
Petitioner,

v.

SETH BAKER, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

HUGH F. YOUNG, JR.
PRODUCT LIABILITY ADVISORY COUNCIL, INC.
1850 Centennial Park Drive
Suite 510
Reston, VA 20191
(703) 264-5300
Of Counsel

JOHN H. BEISNER
Counsel of Record
JESSICA DAVIDSON MILLER
GEOFFREY M. WYATT
JORDAN SCHWARTZ
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000
John.Beisner@skadden.com

Attorneys for Amicus Curiae

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. The Ninth Circuit's Decision Runs Afoul Of Rudimentary Jurisdictional Principles Under 28 U.S.C. § 1291 And Article III 5

II. The Rule Followed By The Ninth Circuit Is Damaging To American Product Manufacturers. 12

CONCLUSION 18

Corporate Members Of The Product Liability Advisory Council 1a

TABLE OF AUTHORITIES

Page(s)

CASES

AT&T Mobility LLC v. Concepcion,
563 U.S. 333 (2011) 13

Blair v. Equifax Check Services, Inc.,
181 F.3d 832 (7th Cir. 1999) 13

Bobbitt v. Milberg LLP,
801 F.3d 1066 (9th Cir. 2015) 15

Bowe v. First of Denver Mortgage Investors,
613 F.2d 798 (10th Cir. 1980) 7, 8, 9

In re Bridgestone/Firestone, Inc.,
288 F.3d 1012 (7th Cir. 2002) 17

Camesi v. University of Pittsburgh Medical Center, 729 F.3d 239 (3d Cir. 2013) ..... passim

Castano v. American Tobacco Co.,
84 F.3d 734 (5th Cir. 1996) 13, 17

Chavez v. Illinois State Police,
251 F.3d 612 (7th Cir. 2001) 7

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) 4, 6, 7, 17

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974) 6

Gannon v. Network Telephone Services, Inc.,
No. 13-56813, 2016 WL 145811
(9th Cir. Jan. 12, 2016) 15

Gutierrez v. Johnson & Johnson,
523 F.3d 187 (3d Cir. 2008) 12

Lewis v. Continental Bank Corp.,
494 U.S. 472 (1990) 4, 10

Rhodes v. E.I. du Pont de Nemours & Co.,
636 F.3d 88 (4th Cir. 2011) 10, 11

In re Rhone-Poulenc Rorer Inc.,
51 F.3d 1293 (7th Cir. 1995) 13

Ruppert v. Principal Life Insurance Co.,
705 F.3d 839 (8th Cir. 2013) 10, 11

STATUTES

28 U.S.C. § 1291 ..... passim

28 U.S.C. § 1292(e) 9

28 U.S.C. § 2072(c) 9

RULES

Fed. R. Civ. P. 1 12

Fed. R. Civ. P. 23(f) 9, 12

Fed. R. Civ. P. 23(f) advisory committee's notes
to 1998 amendment 9

OTHER AUTHORITIES

The 2015 Carlton Fields Jorden Burt Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation 14

William P. Barnette, *The Limits of Consent: Voluntary Dismissals, Appeals of Class Certification Denials, and Some Article III Problems*, 56 S. Tex. L. Rev. 451 (2015) 7, 11

John Doroghazi & Armel Jacobs, *Basic Strategic Considerations in Defending Consumer Class Actions Against Franchisors*, 33 Franchise L.J. 167 (2013) 13

Bruce Hoffman, Remarks, *Panel 7: Class Actions as an Alternative to Regulation: The Unique Challenges Presented by Multiple Enforcers and Follow-On Lawsuits*, 18 Geo. J. Legal Ethics 1311 (2005) 14

Andrew S. Tulumello & Geoffrey C. Weien, *A Practitioner's Guide to Class Actions*, Chapter 24: *Multistate Class Actions and Choice of Law* (2010), http://www.gibsondunn.com/publications/Documents/TulumelloWeien-MultistateClassActions.pdf 13

Joe Van Acker, *Consumers Pulling a Fast One in Cymbalta Case, Eli Lilly Says*, Law360, Oct. 14, 2015, http://www.law360.com/articles/714385/consumers-pulling-a-fast-one-in-cymbalta-case-eli-lilly-says 15

Brian C. Walsh, *Feature, A Primer on the Finality of Decisions for Appeal*, 42 Litig. 30 (2015) 9

Kristen L. Wenger, *The Class Action Fairness Act of 2005: The Limits of Its Text and the Need for Legislative Clarification, Not Judicial Interpretation*, 38 Fla. St. U. L. Rev. 679 (2011) 17

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Product Liability Advisory Council ("PLAC") respectfully submits this brief as *amicus curiae* in support of petitioner Microsoft Corporation ("petitioner" or "Microsoft").[1]

STATEMENT OF INTEREST

PLAC is a non-profit association with over 100 corporate members representing a broad cross-section of American and international product manufacturers.[2] These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product-liability defense attorneys in the country are sustaining (non-voting) members of PLAC.

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that petitioner and respondents have consented to the filing of this *amicus* brief and that *amicus curiae* timely notified counsel of record of its intent to file this brief.

[2] A list of PLAC's current corporate membership is attached to this brief as Appendix A.

Since 1983, PLAC has filed more than 1,050 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product manufacturers.

PLAC's members have an interest in this case because the decision below endorses a rule that favors plaintiffs in dubious class actions that fail at class certification by allowing them to dismiss their claims voluntarily and obtain an immediate appellate ruling on class certification – *even after* the Court of Appeals refuses to hear the appeal on a Rule 23(f) petition. The effect of the ruling is to hand plaintiffs a second bite at the apple (with no corresponding opportunity for defendants to seek review notwithstanding denial of a Rule 23(f) petition). That approach to appellate jurisdiction circumvents the requirement of finality set forth in 28 U.S.C. § 1291, as illustrated by this Court's prior precedent strictly limiting interlocutory review of class-certification orders. It also renders the case-or-controversy requirement of Article III a dead letter.

Moreover, and of greatest concern for PLAC's members, the decision below will make the defense of putative class actions more expensive for class-action defendants, including PLAC's members, given the additional layer of appeals that will be mounted by plaintiffs disappointed by an unfavorable class-certification ruling. This increased cost, coupled with the possibility that a once-defunct class action will ultimately be revived upon successive appeals, will exacerbate the settlement pressure that class-action litigation already wreaks on PLAC's members. Ac-

cordingly, the Court should reverse the decision below.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below endorses a tactic increasingly used by plaintiffs to manufacture appellate jurisdiction over an adverse class-certification ruling: voluntary dismissal of the case in lieu of litigating it on an individual basis to final judgment. This practice is contrary to this Court's precedents, which expressly hold that litigants cannot manipulate appellate jurisdiction by dismissing a case to turn a fundamentally interlocutory ruling into a final judgment. Nevertheless, the U.S. Court of Appeals for the Ninth Circuit endorsed just such a maneuver in this case – and did so without acknowledging this Court's decisions on point. The Court should reverse the decision below and clarify that both the "finality" requirement of 28 U.S.C. § 1291 and the case-or-controversy element of Article III unequivocally foreclose appellate jurisdiction over interlocutory class-certification rulings.

The plaintiffs in this case are Xbox 360 console owners who allege that a design defect in the product scratches game discs. Only a tiny fraction of the putative class experienced the problem about which plaintiffs complain. The district court struck the class allegations, relying heavily on a prior ruling by a different judge denying class certification in a virtually indistinguishable case involving a different set of plaintiffs. According to the district court, the class allegations were legally insufficient because individual issues of causation and damages precluded class treatment. Plaintiffs subsequently sought permis-

sion to appeal the class-certification ruling under Rule 23(f), arguing that "the district court's order effectively kill[ed] th[is] case." Pet. for Permission to Appeal Under Fed. R. Civ. P. 23(f) at 18.

The Ninth Circuit denied the petition and remanded the case to the district court. Pet. App. 10a. Rather than press their individual claims, plaintiffs voluntarily dismissed them for the express purpose of appealing the district court's unfavorable class-certification ruling. The Ninth Circuit denied Microsoft's motion to dismiss the appeal, assumed jurisdiction and reversed.

The Ninth Circuit's assumption of jurisdiction over plaintiffs' appeal ignored this Court's prior command that "the fact that an interlocutory [class-certification] order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering it a 'final decision' within the meaning of § 1291." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 (1978). The Ninth Circuit's decision also flouted the well-established Article III precept that a plaintiff must have a sufficiently concrete "personal stake" in the underlying litigation. *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990). Because the Ninth Circuit clearly erred in allowing plaintiffs to manufacture finality and bypass the requirement of an Article III case or controversy, the decision below should be reversed.

The decision below also has the potential to do great harm to American product manufacturers, providing further grounds for reversing it. Class actions are already inherently expensive for product manufacturers to defend, regardless of their merits, given their high stakes – namely, the risk of a poten-

tially crippling class verdict. These costs would only increase under the approach endorsed by the Ninth Circuit, which would add an additional layer of uncertain and expensive appellate litigation to the class-certification calculus. Moreover, such an approach unfairly gives plaintiffs a second opportunity at appellate review of an adverse class-certification ruling, increasing their settlement leverage over American businesses.

For both of these reasons, the Court should hold that the only avenue for immediately appealing an unfavorable class-certification ruling is seeking a discretionary appeal under Rule 23(f).

ARGUMENT

I. The Ninth Circuit's Decision Runs Afoul Of Rudimentary Jurisdictional Principles Under 28 U.S.C. § 1291 And Article III.

This Court's precedents clearly reject the notion that the finality requirement of 28 U.S.C. § 1291 can be circumvented based on the notion that an adverse interlocutory ruling will persuade a plaintiff to abandon his suit. Voluntary dismissal does not convert an interlocutory order into a final judgment. Instead, it destroys the adversity required to maintain jurisdiction under Article III. The ruling below should be reversed because it ignored this Court's precedents construing § 1291 and misapprehended the jurisdictional aspects of a voluntary dismissal.

First, the decision below contravenes the "finality" requirement of 28 U.S.C. § 1291, as articulated by this Court in *Livesay*. In that case, the U.S. Court of Appeals for the Eighth Circuit concluded that it had jurisdiction over an order decertifying a class action on the ground that the lower court's ruling "had

sounded the 'death knell' of the action" and constituted a final judgment for purposes of 28 U.S.C. § 1291. 437 U.S. at 466. The court of appeals had reasoned that the lack of resources and anticipated costs effectively prevented the plaintiffs from pursuing their claims individually through trial, converting the decertification order into a final judgment. *Id.* at 466-67.

This Court reversed, holding that "[a]n order refusing to certify, or decertifying, a class does not of its own force terminate the entire litigation *because the plaintiff is free to proceed on his individual claim*." *Id.* at 467 (emphasis added). In reaching its decision, the Court underscored the importance of the final judgment rule embodied in § 1291: it "evinces a legislative judgment that '[r]estricting appellate review to "final decisions" prevents the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy.'" *Id.* at 471-72 (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974)). The so-called "death knell" doctrine, the Court declared, runs "directly contrary" to that legislative judgment because it predicates appellate jurisdiction on a costly and inefficient examination of the possible impact a class-certification order will have on the fate of the litigation. *Id.* at 471, 473-74 (internal quotation marks and citation omitted). As the Court explained, "the principal vice" of the "death knell" doctrine is that it "authorizes *indiscriminate* interlocutory review of decisions made by the trial judge," in disregard of the fact that "Congress carefully confined the availability of such review." *Id.* at 474.

In addition, the Court recognized that the doctrine unfairly "operates only in favor of plaintiffs" by

giving them an immediate and automatic right to appeal "even though the class issue – whether to certify, and if so, how large the class should be – will often be of critical importance to defendants as well." *Id.* at 476. Accordingly, because Congress "made 'finality' the test of appealability," *id.* at 472, "the fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering it a 'final decision' within the meaning of § 1291," *id.* at 477.

Since *Livesay*, most federal appeals courts have understood its reasoning to bar efforts by plaintiffs "to manufacture finality" by voluntarily dismissing their claims following the denial of class certification. *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 245-47 (3d Cir. 2013) (plaintiffs could not "avoid the strong presumption against interlocutory review of such orders by voluntarily dismissing all of their claims under Rule 41"); see also, *e.g.*, *Chavez v. Ill. State Police*, 251 F.3d 612, 629 (7th Cir. 2001) (declining to "review the district court's refusal to certify a class" when "the plaintiffs requested and were granted a voluntary dismissal of their . . . claims"); *Bowe v. First of Denver Mortg. Investors*, 613 F.2d 798, 800 (10th Cir. 1980) (similar); William P. Barnette, *The Limits of Consent: Voluntary Dismissals, Appeals of Class Certification Denials, and Some Article III Problems*, 56 S. Tex. L. Rev. 451, 477 (2015) ("a ruling denying class certification is procedural in nature and does not resolve the merits of the named plaintiff's individual claim" and therefore is not immediately appealable under the final judgment rule).

The Ninth Circuit disagreed, reasoning that it had jurisdiction in the present case "under 28 U.S.C. § 1291 because a dismissal of an action with preju-

dice, even when such dismissal is the product of a stipulation, is a sufficiently adverse – and thus appealable – final decision." Pet. App. 12a (internal quotation marks and citation omitted). Notably, the Ninth Circuit's cursory discussion of appellate jurisdiction *did not even cite Livesay* – or any of the many decisions by other circuit courts addressing whether *Livesay* permits appeals in these circumstances.

The Ninth Circuit's decision squarely contradicts *Livesay*, reviving the "death knell" doctrine that this Court previously rejected. As the Third Circuit succinctly explained in rejecting plaintiffs' "attempts to manufacture finality" by voluntarily dismissing their claims in the wake of a class-certification denial:

> [i]f we were to allow such a procedural sleight-of-hand to bring about finality . . . there is nothing to prevent litigants from employing such a tactic to obtain review of discovery orders, evidentiary rulings, or any of the myriad decisions a district court makes before it reaches the merits of an action.

Camesi, 729 F.3d at 245-46. Permitting such tactics "would greatly undermine the policy against piecemeal litigation embodied by § 1291," *id.* at 246 – the very policy that prompted this Court to retire the "death knell" doctrine as a basis for immediately appealing class-certification orders. As the U.S. Court of Appeals for the Tenth Circuit put it, the only difference between *Livesay* and a case in which a plaintiff voluntarily dismisses a claim in the hope of manufacturing appellate jurisdiction is that the death knell in the latter case is more "graphic." *Bowe*, 613 F.2d at 800 (court lacked appellate jurisdiction where plaintiff allowed claim to be dismissed for fail-

ure to prosecute after class certification had been denied). The effect in both circumstances is the same: to permit interlocutory review as a matter of right for disappointed class plaintiffs. This Court's decision in *Livesay* "does not tolerate creation of a loophole by the simple device of allowing the claim of a class representative to be dismissed" voluntarily. *Id.* at 800-02.

Moreover, the panel's decision is all the more egregious because it is fundamentally at odds with the limitations imposed on class-action appeals by Rule 23(f), which was promulgated in response to *Livesay*, and authorizes *discretionary* review of class-certification orders. See Fed. R. Civ. P. 23(f); Brian C. Walsh, *Feature, A Primer on the Finality of Decisions for Appeal*, 42 Litig. 30 (2015). This Court could have exercised its authority under 28 U.S.C. § 2072(c) and 28 U.S.C. § 1292(e) to define class-certification orders as appealable as a matter of right. But it did not do so, instead granting the courts of appeals "unfettered discretion whether to permit the appeal" of a class-certification order. Fed. R. Civ. P. 23(f) advisory committee's notes to 1998 amendment. The Ninth Circuit chose not to exercise that discretion when it denied plaintiffs' petition for interlocutory review under Rule 23(f). That decision was later evaded by plaintiffs' dismissal of their individual claims with prejudice and successive appeal of the district court's adverse class-certification ruling, which "manufacture[d] finality" and "short-circuit[ed] the procedure for appealing" class-certification orders. *Camesi*, 729 F.3d at 245-46. Because such procedural gyrations clearly do not suffice to create "final" judgment for purposes of § 1291 as this Court has construed it, the Ninth Circuit's decision should be reversed.

Second, beyond its error in endorsing "manufactur[ed] finality" in derogation of 28 U.S.C. § 1291, the decision below is also fundamentally at odds with Article III standing and mootness principles as applied by this Court and the other federal courts of appeals. As this Court has recognized, Article III's "case or controversy" requirement dictates that plaintiffs maintain a "personal stake" in the litigation. *Lewis*, 494 U.S. at 477-78. This requirement applies with equal force in the class-action context such that "a putative class representative [must] maintain[] a sufficiently concrete interest in the certification question." *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 99 (4th Cir. 2011). This requirement "must be extant at all stages of review, not merely at the time the complaint is filed." *Camesi*, 729 F.3d at 247 (internal quotation marks and citations omitted).

"Applying the principles set forth by the Supreme Court," the U.S. Court of Appeals for the Fourth Circuit previously "conclude[d] that when a putative class plaintiff voluntarily dismisses the individual claims underlying a request for class certification . . . there is no longer a 'self-interested party advocating' for class treatment in the manner necessary to satisfy Article III standing requirements." *Rhodes*, 636 F.3d at 100 (citation omitted). In such a case, the plaintiff does not possess the particularized "stake" in the appeal, vitiating its case-or-controversy status. *Id.*; accord *Ruppert v. Principal Life Ins. Co.*, 705 F.3d 839, 844 (8th Cir. 2013) ("We therefore agree with the Fourth Circuit that 'when a putative class plaintiff voluntarily dismisses the individual claims underlying a request for class certification, . . ., there is no longer a self-interested party advocating for class treatment in the manner necessary to satisfy

Article III standing requirements.'") (quoting *Rhodes*, 636 F.3d at 100); see also Barnette, *supra*, at 478-79 ("[T]he perceived economic feasibility of ongoing individual litigation is not a substitute for the concrete injury necessary to establish and maintain jurisdiction under Article III."). The Third Circuit reached the same conclusion just two years later, reasoning that plaintiffs in a putative collective action under the Fair Labor Standards Act no longer possessed a sufficient "personal stake in the matter" following their voluntary dismissal of their individual claims with prejudice. *Camesi*, 729 F.3d at 247-48.

The same is true here. Plaintiffs abandoned any personal stake in this case when they voluntarily dismissed their individual claims with prejudice following the district court's decision to strike the class allegations. Plaintiffs' conduct "not only extinguished [their] individual claims, but also any residual representational interest that they must have once had." *Camesi*, 729 F.3d at 247. Accordingly, even if the voluntary dismissal of their claims could be construed as a final judgment under 28 U.S.C. § 1291 – which it cannot – there would no longer be an Article III case or controversy. See *Ruppert*, 705 F.3d at 843 ("[I]f we are wrong about finality, then Ruppert's voluntary dismissal of his individual claims renders the case moot.").

For all of these reasons, the Court should reverse the Ninth Circuit's decision, clarifying that plaintiffs may *not* evade *Livesay* and Article III by voluntarily dismissing their claims in the wake of an adverse class-certification ruling in order to seek immediate appellate review of that unfavorable decision.

II. The Rule Followed By The Ninth Circuit Is Damaging To American Product Manufacturers.

The Court should also reverse the decision below because affording plaintiffs multiple bites at the appellate apple will hurt American product manufacturers.

Rule 23(f) is supposed to limit class-action appeals (and by extension the costs associated with litigating them). Indeed, that rule requires that petitions be filed within 14 days after the adverse order on class certification, Fed. R. Civ. P. 23(f), and "specifically cautions the appellate courts to act expeditiously on such petitions for permission to appeal." *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 199 (3d Cir. 2008). In so doing, it advances the central objective of the Federal Rules "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

In stark contrast, the Ninth Circuit's rule would promote slow-moving, piecemeal review by spawning dismissals and appeals in every case involving an unsuccessful class-certification bid, often many months after the adverse class-certification order was issued and after an initial 23(f) petition was denied. Moreover, because the Ninth Circuit's rule works only in favor of plaintiffs, it would provide them with greater leverage over defendants in settlement negotiations, using the threat of possible reversal on a guaranteed appeal from any adverse ruling on class certification to force resolution. It would also foster greater uncertainty, delay and costs in defending against a purported class action. For these reasons, the Ninth Circuit's rule stands to greatly expand the

costs of litigation and the potential exposure to liability in questionable class actions.

Increasing the costs to American businesses of litigating class actions would be bad policy. "By their very nature, class actions are high-stakes endeavors." John Doroghazi & Armel Jacobs, *Basic Strategic Considerations in Defending Consumer Class Actions Against Franchisors*, 33 Franchise L.J. 167, 192-93 (2013); see also *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (recognizing the "higher stakes of class litigation"). This is so because "[a]ggregation of claims . . . makes it more likely that a defendant will be found liable and results in significantly higher damage awards" than individual actions. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). For example, "[a] verdict in a consumer fraud class action will deliver a crippling blow to all but the most well-heeled" defendant. Doroghazi & Jacobs, *supra*, at 192-93.

These costs are magnified in cases where – as here – the plaintiffs seek to pursue claims on behalf of nationwide classes, which "can propel the stakes of a case into the stratosphere." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (citing *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995)); see also Andrew S. Tulumello & Geoffrey C. Weien, *A Practitioner's Guide to Class Actions*, Chapter 24: *Multistate Class Actions and Choice of Law*, at 621 (2010), http://www.gibsondunn.com/publications/Documents/TulumelloWeien-MultistateClassActions.pdf ("[C]ertification of a . . . nationwide class increases the stakes of litigation and can create significant settlement pressure for defendants."). These costs pose an acute threat to product manufacturers, whose

goods are increasingly being challenged in sprawling putative class actions. The purported consumer class in the instant case is illustrative. According to Microsoft, the class "may exceed 10 million people." Pet. 16. While each class member could only recover – at best – a fraction of the purchase price in an individual proceeding, aggregation of *millions* of disparate claims in a single nationwide proceeding exposes the manufacturer to the possibility of a multi-million-dollar verdict.

In light of these enormous stakes, companies already spend considerable sums defending against putative class actions. In fact, a 2015 study on class actions found that companies spent $2 billion on class-action lawsuits in the preceding year. *The 2015 Carlton Fields Jorden Burt Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation*, at 3; see also Bruce Hoffman, Remarks, *Panel 7: Class Actions as an Alternative to Regulation: The Unique Challenges Presented by Multiple Enforcers and Follow-On Lawsuits*, 18 Geo. J. Legal Ethics 1311, 1329 (2005) (panel discussion statement of Bruce Hoffman, then Deputy Director of the Federal Trade Commission's Bureau of Competition) (noting the "very high cost for everybody concerned, courts, defendants, plaintiffs of litigating a class action . . . ."). Simply put, defending against putative class actions is already an inherently expensive proposition for American businesses given the high stakes involved – i.e., the risk of a gargantuan class verdict.

Granting plaintiffs an additional layer of appeal in every case involving an adverse class-certification ruling will needlessly prolong class-action litigation, generating further litigation costs for American

manufacturers. Indeed, that dynamic is already playing out in full force in the wake of the Ninth Circuit's ruling, with plaintiffs relying on that decision to manufacture jurisdiction over unfavorable class-certification rulings before final judgment on the merits. See, *e.g.*, *Bobbitt v. Milberg LLP*, 801 F.3d 1066, 1069 (9th Cir. 2015) (relying on instant case to find jurisdiction over appeal after plaintiffs' "voluntary dismissal of their individual claims"), *petition for cert. filed*, 80 U.S.L.W. 3338 (U.S. Dec. 4, 2015) (No. 15-734); Order Granting Pls.' Mot. to Dismiss at 1, *Saavedra v. Eli Lilly & Co.*, No. 2:12-cv-09366-SVW-MAN, ECF No. 203 (C.D. Cal. Oct. 26, 2015) (granting motion to dismiss claims following denial of class certification and rejecting argument by defendant that "dismissal . . . risks the possibility of wasteful multiple appeals"); see also *Gannon v. Network Tel. Servs., Inc.*, No. 13-56813, 2016 WL 145811, at *1 (9th Cir. Jan. 12, 2016) (affirming denial of class certification; "We have jurisdiction of this appeal under 28 U.S.C. § 1291 because the parties stipulated to dismissal of Gannon's Second Amended Complaint."). For example, in *Saavedra*, the district court twice rejected proposed classes of purchasers of the drug Cymbalta. See Def.'s Opp'n to Pls.' Mot. to Dismiss at 1, No. 2:12-cv-09366-SVM-MAN, ECF No. 201 (C.D. Cal. Oct. 14, 2015). After the court's first denial of class certification, the plaintiffs petitioned for interlocutory review under Rule 23(f), which the Ninth Circuit denied. *Id.* Following the district court's second certification ruling, the plaintiffs moved to dismiss their individual claims "in a transparent bid for a second chance to appeal orders denying their motions for class certification." Joe Van Acker, *Consumers Pulling a Fast One in Cym-*

balta Case, Eli Lilly Says, Law360, Oct. 14, 2015, http://www.law360.com/articles/714385/consumers-pulling-a-fast-one-in-cymbalta-case-eli-lilly-says.

In pressing their motion, the plaintiffs relied on the instant case, *Baker v. Microsoft Corp.*, for the proposition that a voluntary dismissal with prejudice after the denial of class certification confers appellate jurisdiction over the adverse class-certification ruling. See Pls.' Mot. to Dismiss at 2-3, No. 2:12-cv-09366-SVW-MAN, ECF No. 199 (C.D. Cal. Sept. 30, 2015). The district court granted the voluntary motion to dismiss, Order Granting Pls.' Mot. to Dismiss at 1, *Saavedra v. Eli Lilly & Co.*, No. 2:12-cv-09366-SVW-MAN, ECF No. 203 (C.D. Cal. Oct. 26, 2015), which precipitated a second round of appellate review, prolonging the litigation and costing the defendant considerable sums of money.

This type of gamesmanship would become the norm – as opposed to the exception – in all federal courts if the Court affirms the Ninth Circuit's decision, with plaintiffs' attorneys taking solace in the fact that they can automatically appeal an adverse class-certification ruling by simply dismissing their individual claims with prejudice.[3] The ensuing delays in class-action litigation and the expenditures in time and resources generated by this practice will likewise proliferate and wreak havoc on the parties and the judicial system alike.

Moreover, because the approach endorsed by the Ninth Circuit only inures to the benefit of *plaintiffs* –

---

[3] Such tactics are particularly likely in the context of class actions, which tend to be lawyer-driven and, as a consequence, unlikely to feature individual plaintiffs who insist on vindicating their individual claims to final judgment.

not defendants – plaintiffs would gain greater leverage over defendants in inducing settlements. Defendants faced with improvidently certified, meritless lawsuits already feel intense pressure to settle before trial, culminating in "judicial blackmail." *Castano*, 84 F.3d at 746 ("These settlements have been referred to as judicial blackmail."); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015-16 (7th Cir. 2002) ("Aggregating millions of claims on account of multiple products manufactured and sold across more than ten years makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable – and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims."); see also Kristen L. Wenger, *The Class Action Fairness Act of 2005: The Limits of Its Text and the Need for Legislative Clarification, Not Judicial Interpretation*, 38 Fla. St. U. L. Rev. 679, 688 (2011) ("Critics of class action litigation have also pointed out that the propensity for plaintiffs' lawyers to file allegedly frivolous lawsuits and the potential for massive jury verdicts have generally been sufficient to force corporations into settling unfounded claims or deter otherwise honest corporations from expanding their operations."). As this Court recognized in *Livesay*, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle [the case] and to abandon a meritorious defense." 437 U.S. at 476.

Affording plaintiffs multiple opportunities in seeking class certification will exacerbate the pressure to settle regardless of the merit of the underlying claims. The resultant increased costs of class litigation will put settlement pressure on many

defendants, as will the possibility of reversal that would not exist but for the Ninth Circuit's one-sided rule. At bottom, the Ninth Circuit's ruling countenances a slanted rule that plaintiffs will undoubtedly exploit to coerce defendants into high-dollar settlements that bear no relationship to the merits of the claims at issue.

For these reasons too, the Court should reverse the Ninth Circuit's decision.

CONCLUSION

For the foregoing reasons, and those stated by petitioner Microsoft Corporation, the Court should reverse the Ninth Circuit's decision.

Respectfully submitted,

HUGH F. YOUNG, JR.
PRODUCT LIABILITY ADVISORY COUNCIL, INC.
1850 Centennial Park Drive
Suite 510
Reston, VA 20191
(703) 264-5300
Of Counsel

JOHN H. BEISNER
Counsel of Record
JESSICA DAVIDSON MILLER
GEOFFREY M. WYATT
JORDAN SCHWARTZ
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000
John.Beisner@skadden.com
Attorneys for Amicus Curiae

March 18, 2016

APPENDIX A

Corporate Members Of The Product Liability Advisory Council

3M
Altec, Inc.
Altria Client Services LLC
Astec Industries
Bayer Corporation
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
The Boeing Company
Bombardier Recreational Products, Inc.
Boston Scientific Corporation
Bridgestone Americas, Inc.
Bristol-Myers Squibb Company
C. R. Bard, Inc.
Caterpillar Inc.
CC Industries, Inc.
Celgene Corporation
Chevron Corporation
Cirrus Design Corporation
Continental Tire the Americas LLC
Cooper Tire & Rubber Company
Crane Co.
Crown Cork & Seal Company, Inc.
Crown Equipment Corporation
Daimler Trucks North America LLC
Deere & Company
Delphi Automotive Systems
Discount Tire
The Dow Chemical Company
E.I. duPont de Nemours and Company
Eisai Inc.
Emerson Electric Co.

Endo Pharmaceuticals, Inc.
Exxon Mobil Corporation
FCA US LLC
Ford Motor Company
Fresenius Kabi USA, LLC
General Motors LLC
Georgia-Pacific LLC
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
The Home Depot
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works Inc.
Isuzu North America Corporation
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Kawasaki Motors Corp., U.S.A.
KBR, Inc.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Lincoln Electric Company
Magna International Inc.
Mazak Corporation
Mazda Motor of America, Inc.
Medtronic, Inc.
Merck & Co., Inc.
Meritor WABCO
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Mueller Water Products

Novartis Pharmaceuticals Corporation
Novo Nordisk, Inc.
NuVasive, Inc.
Pella Corporation
Pfizer Inc.
Pirelli Tire, LLC
Polaris Industries, Inc.
Porsche Cars North America, Inc.
RJ Reynolds Tobacco Company
Robert Bosch LLC
SABMiller Plc
The Sherwin-Williams Company
St. Jude Medical, Inc.
Stanley Black & Decker, Inc.
Stryker Corporation
Subaru of America, Inc.
Takeda Pharmaceuticals U.S.A., Inc.
TAMKO Building Products, Inc.
TASER International, Inc.
Techtronic Industries North America, Inc.
Teleflex Incorporated
TK Holdings Inc.
Toyota Motor Sales, USA, Inc.
U-Haul International
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen Group of America, Inc.
Volvo Cars of North America, Inc.
Wal-Mart Stores, Inc.
Western Digital Corporation
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
ZF TRW
Zimmer Biomet

RECORD
AND
BRIEFS

No. 15-457

IN THE
Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

v.

SETH BAKER, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PUBLIC CITIZEN, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

ADINA H. ROSENBAUM
Counsel of Record
SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th St. NW
Washington, DC 20009
(202) 588-1000
arosenbaum@citizen.org

Counsel for Amicus Curiae

May 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The Respondents Have a Sufficient Personal Stake in Class Certification to Satisfy Article III. 3

II. Reversal of the Denial of Class Certification Relates Back to the Date of Denial. 9

III. The Court's Mootness Precedents Protect Sound Judicial Administration. 12

CONCLUSION 13

TABLE OF AUTHORITIES

Cases	Page(s)
American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974)	12
Boeing Co. v. Van Gemert, 444 U.S. 472 (1980)	7
Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663 (2016)	1
Camreta v. Greene, 563 U.S. 692 (2011)	3
Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978)	2, 4, 8, 12
Deposit Guaranty National Bank v. Roper, 445 U.S. 326 (1980)	*passim*
Espenscheid v. DirectSat USA, LLC, 688 F.3d 872 (7th Cir. 2012)	7
Franks v. Bowman Transportation Co., 424 U.S. 747 (1976)	10
Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167 (2000)	3
Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013)	1, 6, 10
Lewis v. Continental Bank Corp., 494 U.S. 472 (1990)	6
Sosna v. Iowa, 419 U.S. 393 (1975)	10, 11

Swisher v. Brady,
438 U.S. 204 (1978) 11

United Airlines, Inc. v. McDonald,
432 U.S. 385 (1977) 8

United States Parole Commission v. Geraghty,
445 U.S. 388 (1980) ..... *passim*

INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., a national consumer-advocacy organization, appears before Congress, administrative agencies, and courts to work for enactment and enforcement of laws protecting consumers, workers, and the general public. Public Citizen often represents consumer interests in litigation, including as amicus curiae in this Court and the federal courts of appeals.

Public Citizen has a longstanding interest in protecting the right of access to the civil justice system and the use of class actions in appropriate cases to facilitate such access. Those interests are threatened by overly broad arguments that courts lack subject-matter jurisdiction over plaintiffs' claims. As a result, Public Citizen and its attorneys have participated, either as amicus curiae or as counsel for parties, in many cases in which defendants have argued that courts lack Article III jurisdiction over class claims after the named plaintiffs' individual claims have allegedly been rendered moot. These cases include *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), and *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013).

Public Citizen is filing this brief to address the petitioner's argument that this case is moot if appellate review cannot reinstate the named plaintiffs' individual claims. *See* Pet'r Br. 39-41. This argument misunderstands this Court's class-action mootness precedents and, if accepted, would thwart plaintiff classes from obtaining recoveries to which they are entitled.

---

[1] This brief was not authored in whole or in part by counsel for a party. No one other than amicus curiae made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters of consent have been lodged with the Court.

SUMMARY OF ARGUMENT

In *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), and *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), this Court considered whether, in a case brought on behalf of a class, the termination of the named plaintiffs' individual claims after the district court denied class certification mooted the case and deprived the court of appeals of jurisdiction to review the denial of class certification. In both cases, the Court held that the case was not moot and that the plaintiffs maintained a sufficient personal stake in the class claims to appeal the class certification denial.

This case now presents the question (among others) whether a class action becomes moot if the named plaintiffs' individual claims are terminated through a dismissal with prejudice after the district court denies class certification. Under the reasoning of *Geraghty* and *Roper*, the case is not moot. Regardless of whether the named plaintiffs' individual claims can be reinstated, the plaintiffs maintain a sufficient personal stake in the class claims for the court of appeals to review the denial of class certification.

Indeed, named plaintiffs who dismiss their claims so that they can appeal the denial of class certification have the same stake in class certification as named plaintiffs who have litigated their individual claims to a favorable final judgment. It is well settled that courts have jurisdiction over appeals from denials of class certification brought under those circumstances. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978).

As this Court has recognized, the decision whether to certify a class will often be the most important decision in a case. *See Roper*, 445 U.S. at 339. The mootness

principles set forth in this Court's precedents ensure that, when a district court erroneously denies class certification, the court of appeals is able to review and reverse that denial, regardless of whether the passage of time, acts of defendants, or impracticalities of litigating small claims lead to the final termination of the named plaintiffs' individual claims. The Court's precedents help make certain that a district court's erroneous denial of class certification does not irrevocably deprive the courts of the efficiency and economy of scale served by the class-action device or keep plaintiffs with meritorious claims from being able to join together to vindicate their rights.

ARGUMENT

I. The Respondents Have a Sufficient Personal Stake in Class Certification to Satisfy Article III.

Mootness doctrine is grounded in Article III's "case-or-controversy limitation on federal judicial authority." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000). "To enforce this limitation," a party must demonstrate a "personal stake" in the suit both at the beginning of the case and throughout the course of the litigation. *Camreta v. Greene*, 563 U.S. 692, 702 (2011).

This Court has repeatedly recognized that a named plaintiff whose individual claims have ended retains a sufficient personal stake in the case to appeal a denial of class certification. In *Geraghty*, 445 U.S. at 404, the Court held that the expiration of the named plaintiff's individual claim after the denial of class certification does not moot an appeal of that denial, because the plaintiff maintains a sufficient personal stake in class certification to satisfy Article III. In *Roper*, 445 U.S. at 333, the Court held that a tender to named plaintiffs of the amounts

they claim individually, followed by entry of judgment in their favor, does not moot a case where the plaintiffs retain an economic interest in the class claims. And in *Livesay*, 437 U.S. at 469, the Court recognized that named plaintiffs who litigate their case to a final judgment after the denial of class certification can appeal the denial of class certification after judgment is entered on their individual claims. Likewise, here, even if the respondents' claims cannot be reinstated on appeal, they have a sufficient personal stake in the class action to appeal the denial of class certification.

A. In *Geraghty*, the Court held that named plaintiffs maintain a sufficient personal stake in class certification to appeal the denial of class certification after their individual claims become moot. 445 U.S. at 404. *Geraghty* was a challenge to the U.S. Parole Commission's parole release guidelines, brought by a prisoner on behalf of a class. The district court denied the plaintiff's motion for class certification and granted summary judgment for the defendant. *Id.* at 393. While both issues were on appeal, the plaintiff was released from prison, thereby mooting his individual claim. *Id.* at 394. The question thus arose whether his release from prison mooted the appeal of the denial of class certification. The Court held that it did not: We "hold that an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied." *Id.* at 404.

The Court explained that a "plaintiff who brings a class action presents two separate issues for judicial resolution": "the claim on the merits" and "the claim that he is entitled to represent a class." *Id.* at 402. "[W]hether the plaintiff may continue to press the class certification claim, after the claim on the merits 'expires,' ... requires

reference to the purposes of the case-or-controversy requirement." *Id.* "[T]he purpose of the 'personal stake' requirement," the Court determined, "is to assure that the case is in a form capable of judicial resolution," with "sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions." *Id.* at 403. The Court concluded that these requirements could be met "with respect to class certification notwithstanding the fact that the named plaintiff's claim on the merits has expired." *Id.* Even if his individual claim on the merits has expired, a named plaintiff can retain "a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined." *Id.* at 404.

Even assuming that the named plaintiffs' dismissal of their individual claims with prejudice irrevocably bars the plaintiffs from pursuing those claims, this case presents a situation almost identical to that in *Geraghty*. As in *Geraghty*, the named plaintiffs' claims were resolved after the denial of class certification. As in *Geraghty*, the "question whether class certification is appropriate remains as a concrete, sharply presented issue." *Id.* at 403-04. And as in *Geraghty*, the respondents "continue[] vigorously to advocate [their] right to have a class certified." *Id.* at 404.

The only difference between this case and *Geraghty* is that, in *Geraghty*, the plaintiff's claim became moot because of the passage of time, whereas, here, the plaintiffs voluntarily dismissed their claims with prejudice. According to Microsoft, that distinction deprives respondents of the personal stake in class certification recognized in *Geraghty* if their claims cannot be reinstated based on the reversal of the district court's denial of certification. Pet'r Br. at 39-40. To the

contrary, that the respondents dismissed their claims with prejudice and thus took the risk that those claims might be irrevocably lost in order to appeal the class certification denial demonstrates the vigor with which the respondents have advocated for class certification—a vigor that surpasses even that in *Geraghty*.[2] Unlike the plaintiff in *Geraghty*, whose claim became moot when he was released from prison, respondents jeopardized their personal claims and their individual rights to recover so they could vindicate the interests of the class. Under these circumstances, the personal-stake requirement is met "with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired." *Id.* at 403.

B. Microsoft downplays *Geraghty* by discussing the case in tandem with *Roper*, 445 U.S. 326, in which the Court held that an economic interest in class certification, such as an interest in shifting costs, can, on its own, provide a sufficient personal stake in class certification to allow a plaintiff whose individual claim is satisfied to appeal a denial of class certification. Microsoft contends that plaintiffs who have voluntarily dismissed their claims have no interest in shifting costs. Microsoft also notes that, in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1532 n.5 (2013), the Court questioned *Roper*'s continuing validity in light of a statement in *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990), that an interest in attorneys' fees does not create an Article III case or controversy.

---

[2] In this sense, plaintiffs who dismiss their individual claims contrast starkly with plaintiffs who *settle* their individual claims for a personal benefit. *See Geraghty*, 445 U.S. at 404 n.10 (intimating "no view as to whether a named plaintiff who settles the individual claim after denial of class certification may ... appeal from the adverse ruling on class certification").

Microsoft is wrong about the application of *Roper*. Whether the plaintiff has an interest in shifting costs turns on whether the plaintiff will be successful on behalf of the class, not on whether she has been successful in her own right. Plaintiffs who have voluntarily dismissed their claims can retain as much interest as plaintiffs whose claims have been satisfied in "shift[ing] to successful class litigants a portion of those fees and expenses that have been incurred in th[e] litigation." *Roper*, 445 U.S. at 334 n.6. *Cf. Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (discussing attorneys' fees to a litigant "who recovers a common fund for the benefit of persons other than himself"); *see also Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872 (7th Cir. 2012) (determining that plaintiff who settled individual claim had continuing economic interest in class certification).

This Court does not need to decide whether *Roper* applies here, however, or whether *Roper* was affected by *Lewis*, because, regardless, *Geraghty* demonstrates that the personal stake a plaintiff may have in pursuing class certification is not limited to the economic interest discussed in *Roper*. *See Geraghty*, 445 U.S. at 417 (Powell, J., dissenting) (noting that, in *Geraghty*, there was no "interest in sharing costs"). Under *Geraghty*, named plaintiffs can have "a 'personal stake' in obtaining class certification," regardless of whether they have an economic stake in the class claims. *Id.* at 404. Respondents have that personal stake here, and it is "sufficient to assure that Art. III values are not undermined." *Id.*

C. In addition to having the same personal stake in class certification as named plaintiffs whose claims have expired, named plaintiffs who dismiss their claims with prejudice have (if their claims cannot be reinstated) the

same personal stake in class certification as named plaintiffs who litigate their claims to a favorable judgment on the merits.

It is well-settled that courts have jurisdiction to review a denial of class certification after a final judgment on the merits of the individual claims. As this Court stated in *Livesay*, "an order denying class certification is subject to effective review after final judgment at the behest of the named plaintiff or intervening class members." 437 U.S. at 469; *see also, e.g.*, *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 393 (1977) ("The District Court's refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs[.]").

Indeed, this Court has noted that the "appealability of the class certification question *after* final judgment on the merits was an important ingredient of [the] ruling in *Livesay*." *Roper*, 445 U.S. at 337-38. Likewise, the ability of named plaintiffs to appeal denials of class certification after favorable judgments on the merits is an important part of Microsoft's argument here. *See* Pet'r Br. 40; *id.* at 18 (describing appealing after a successful final judgment on the merits to be a "*sure path* to appellate review" (quoting Fed. R. Civ. P. 23 advisory committee's note to 1998 amendment)).

If their claims cannot be reinstated, named plaintiffs who have dismissed their individual claims with prejudice have the same personal stake in the class certification decision as plaintiffs who have litigated their claims to a favorable final judgment. In both cases, the plaintiffs lost their motions for class certification and are seeking to appeal that issue after final judgment. In both cases, the plaintiffs' individual claims are over and will not be at issue in the appeal. *See, e.g.*, *Roper*, 445 U.S. at

333 ("We can assume that a district court's final judgment fully satisfying named plaintiffs' private substantive claims would preclude their appeal on that aspect of the final judgment."). And in both cases, the named plaintiffs may—or may not—have an economic interest in the class certification decision, such as an interest in shifting the costs of litigating the class action to other members of the class.

Microsoft argues that the fact that the respondents consented to dismiss their claims with prejudice deprives them of any personal stake in class certification. Pet'r Br. 15. But plaintiffs who litigate their claims to a favorable judgment on the merits likewise ask for judgment to be entered, yet can appeal the denial of class certification. Microsoft also argues that plaintiffs who dismiss their claims with prejudice should not be able to appeal the denial of class certification because they "were free to litigate their individual claims to conclusion" and appeal then. Pet'r Br. 40. In so arguing, Microsoft recognizes that resolution of an individual claim does not necessarily moot an appeal of the class certification decision, and it fails to offer a doctrinal basis to explain why the litigant in the successfully litigated case can appeal but the litigants here cannot. The respondents have the same personal stake in the class certification decision that they would have if they had litigated to a favorable final judgment on the merits, and, regardless of whether their individual claims can be reinstated, the case is not moot.

II. Reversal of the Denial of Class Certification Relates Back to the Date of the Denial.

In addition to its personal-stake analysis, *Geraghty* provided an alternative basis for its holding: "that when a District Court erroneously denies a procedural motion, which, if correctly decided, would have prevented the

action from becoming moot, an appeal lies from the denial and the corrected ruling 'relates back' to the date of the original denial." 445 U.S. at 404 n.11.

Like *Geraghty*'s personal-stake analysis, *Geraghty*'s relation-back analysis applies equally whether the named plaintiff's case has been mooted by the passage of time or whether the plaintiff has voluntarily dismissed his claims with prejudice. In either situation, if the court of appeals reverses a denial of class certification, that "corrected ruling on appeal 'relates back' to the time of the erroneous denial of the certification motion," *Genesis*, 133 S. Ct. at 1530, and the class is deemed to have been certified on that date. Once there is a certified class, that class has an "independent legal status," *id.*, and its interests suffice to satisfy the case or controversy requirement. Thus, under *Geraghty*'s alternative analysis, the termination of the named plaintiff's individual claim does not affect the courts' subject-matter jurisdiction over the case, regardless of why the named plaintiff's individual claim has ended. *See Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Sosna v. Iowa*, 419 U.S. 393 (1975).

Microsoft contends that *Geraghty*'s relation-back analysis "'comes into play only when a court confronts a jurisdictional gap—an individual claim becoming moot before the court can certify a representative action,'" and that it therefore does not apply where the named plaintiffs voluntarily dismiss their claims. Pet'r Br. 40 (quoting *Genesis*, 133 S. Ct. at 1536 (Kagan, J., dissenting)). This argument confuses two separate relation-back doctrines. In addition to the relation-back doctrine discussed in *Geraghty*, in which a corrected ruling on class certification relates back to the date of denial of class certification, this Court has recognized

that, in certain circumstances "in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion, ... certification can be said to 'relate back' to the filing of the complaint." *Sosna*, 419 U.S. at 402 n.11; *see also, e.g.*, *Swisher v. Brady*, 438 U.S. 204, 213 n.11 (1978). It is only in this second type of relation back—relation back to the date of the filing of the class-action complaint—where a jurisdictional gap exists before the district court has the opportunity to certify a class action. In the relation-back scenario discussed in *Geraghty*—relation back to the denial of class certification—the district court *had* the opportunity to certify a class action, but erroneously decided not to.

Rather than arising when the individual claim is resolved before the district court has the opportunity to consider class certification, the "jurisdictional gap" addressed in *Geraghty* arises when the individual claim is resolved after an erroneous denial of certification but before that ruling can be corrected on appeal. That gap is the same regardless of whether the named plaintiff's claim is resolved through mootness or because the named plaintiff dismissed his claim because he cannot afford to litigate the case on an individual basis. In either circumstance, there is a period between the date on which the named plaintiff's claim ends and the date on which the appellate court reverses the denial of class certification when no named plaintiff has a live individual claim. In that scenario, the appellate reversal of the erroneous decision relates back to the date of that decision and prevents termination of the named plaintiff's individual claim from mooting the appeal.

III. The Court's Mootness Precedents Protect Sound Judicial Administration.

The class-action mechanism serves important purposes. It enables injured people to come together to obtain relief, *see Roper*, 445 U.S. at 339, and furthers "efficiency and economy of litigation," *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974). When the requirements of Federal Rule of Civil Procedure 23 are met but the district court nonetheless denies class certification, and when the plaintiff has no means of appealing the district court's erroneous denial of class certification, the purposes underlying the class-action mechanism are undermined and both litigants and courts are deprived of the efficiencies class actions provide.

The denial of a motion for class certification generally cannot be appealed until the litigation has ended on the merits of the individual claim. *See Livesay*, 437 U.S. 463. As a practical matter, however, the named plaintiffs' claim often will not survive to be decided on the merits. Sometimes those claims will expire because of the passage of time. Other times they will end through acts of the defendant. And still other times, the costs of litigating small claims will prevent plaintiffs from being able to continue to litigate their individual claims, and they will dismiss those claims before litigating to a judgment on the merits.

Microsoft argues that the Court should only recognize continued jurisdiction when defendants' actions or the passage of time thwart potentially meritorious class actions, not when the practicalities and costs of litigation do so. But Microsoft provides neither a distinction grounded in Article III nor a reason why sound judicial administration would counsel in favor of appellate review in one situation but not the other. None

of these circumstances implicate *Livesay*'s concerns about interlocutory appeals. And in all, dismissing the appeal would multiply the effects of the district court's erroneous denial of class certification and would deny the parties and courts the benefits of a properly certified class action.

This Court has recognized that a "district court's ruling on the certification issue is often the most significant decision rendered in ... class-action proceedings." *Roper*, 445 U.S. at 339. The Court should reject Microsoft's plea to adopt an arbitrary distinction that would strip the federal appellate courts of jurisdiction to review a category of these significant decisions.

CONCLUSION

For the foregoing reasons, the Court should hold that it has jurisdiction over the class claims.

Respectfully submitted,

Adina H. Rosenbaum
Counsel of record
Scott L. Nelson
Public Citizen Litigation Group
1600 20th St. NW
Washington, DC 20009
(202) 588-1000
arosenbaum@citizen.org

Counsel for Public Citizen, Inc.

May 2016

RECORD
AND
BRIEFS

No. 15-457

Supreme Court, U.S.
FILED
MAY 23 2016
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,
Petitioner,

v.

SETH BAKER, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PUBLIC JUSTICE, P.C. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

Public Justice, P.C.
LESLIE A. BRUECKNER
555 12th Street, Suite 1230
Oakland, CA 94607

F. PAUL BLAND, JR.
1620 L Street NW, Suite 630
Washington, DC 20036

Lieff Cabraser Heimann & Bernstein, LLP
JONATHAN D. SELBIN
JASON L. LICHTMAN
Counsel of Record
250 Hudson Street
8th Floor
New York, NY 10013
(212) 355-9500
jlichtman@lchb.com

ANDREW R. KAUFMAN
150 Fourth Ave N, Suite 1650
Nashville, TN 37219

Library of Congress

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. IT IS WELL-SETTLED THAT FEDERAL COURTS RETAIN JURISDICTION OVER A CLASS ACTION EVEN IF THE NAMED PLAINTIFF'S CLAIMS ARE MOOT 3

A. Federal courts have jurisdiction over a class action even if the named plaintiff's claim becomes moot before the class is certified 3

B. *Roper* and *Geraghty* comport with Article III. 5

TABLE OF CONTENTS

(continued)

Page

1. Once the court grants certification, the existence of a class with live claims "relates back" to the filing of the complaint, meaning that a case or controversy existed throughout the litigation. 6

2. The rights of the absent class members modify the mootness analysis. 8

3. The purpose of the 'personal stake' requirement is satisfied in a class action even if the named plaintiff's claim is moot..... 9

C. This Court's recent opinions are consistent with *Roper* and *Geraghty*.,.....10

TABLE OF CONTENTS

(continued)

Page

II. THE MOOTNESS PRINCIPLES IDENTIFIED IN *ROPER* AND *GERAGHTY* ARE CRITICAL TO THE INTEGRITY AND EFFICACY OF THE CLASS ACTION DEVICE..... 12

A. Mooting class actions when absent class members have live claims would disrupt the Rule 23 process. 12

B. Mooting class actions would have particularly troubling implications for small-value claims. 14

III. *ROPER* AND *GERAGHTY* SUPPORT AFFIRMANCE IN THIS CASE..... 15

CONCLUSION..... 16

TABLE OF AUTHORITIES

Page

Cases

Already, LLC v. Nike, Inc.,
133 S. Ct. 721 (2013) 5

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997) 2, 12, 14

Campbell-Ewald Co. v. Gomez,
136 S. Ct. 663 (2016) 5, 10, 14

Carnegie v. Household Int'l, Inc.,
376 F.3d 656 (7th Cir. 2004) 15

Cnty. of Riverside v. McLaughlin,
500 U.S. 44 (1991) 7

Daubert v. Merrell Dow Pharm., Inc.,
509 U.S. 579 (1993) 13

Deposit Guaranty Nat'l Bank v. Roper,
445 U.S. 326 (1980) ..... passim

Eisen v. Carlise & Jacquelin,
417 U.S. 156 (1974) 14

Flast v. Cohen,
392 U.S. 83 (1986) 9

Franks v. Bowman Transp. Co., Inc.,
424 U.S. 747 (1976) 7

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.,
528 U.S. 167 (2000) 5

Genesis Healthcare Corp. v. Symczyk,
133 S. Ct. 1523 (2013) 5, 10

TABLE OF AUTHORITIES
(continued)

Page

Gulf Oil Co. v. Bernard,
452 U.S. 89 (1981) 13

Lewis v. Cont'l Bank Corp.,
494 U.S. 472 (1990) 10, 11

Philips Petrol. Co. v. Shutts,
472 U.S. 797 (1985) 15

Sosna v. Iowa,
419 U.S. 393 (1975) 6, 7

Tyson Foods v. Bouaphakeo,
136 S. Ct. 1036 (2016) 13

United Airlines, Inc. v. McDonald,
432 U.S. 385 (1977) 7

United States Parole Comm'n v. Geraghty,
445 U.S. 388 (1980) ..... passim

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) 12, 13

Rules

Advisory Notes to Rule 23, 2003 Amendments 13

Fed. R. Civ. P. Rule 23(d)(1)(E) 13

Fed. R. Civ. P. Rule 23(d)(C) 13

Fed. R. Civ. P. Rule 23(g)(3) 13

Sup. Ct. R. 37.3(a) 1

TABLE OF AUTHORITIES
(continued)

Page

Treatises

William B. Rubenstein, Newberg on Class Actions
§ 3:71 (5th ed. 2015)..... 6

STATEMENT OF INTEREST[1]

Public Justice, P.C. is a national public interest law firm dedicated to pursuing justice for the victims of corporate and governmental abuses. It specializes in precedent-setting and socially significant cases designed to advance consumers' and victims' rights, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. Public Justice regularly represents employees and consumers in class actions. In its experience, the class action device is often the only meaningful way that individuals can vindicate important legal rights.

Public Justice submits this brief to underscore the importance of the principles embodied in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), and *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980). These cases hold that a proposed class representative has a concrete, personal stake in actually representing the class, even if her individual claims become moot. Disrupting this principle—rooted in nearly 40-years of precedent—would contravene Article III and undermine the integrity and efficacy of the class action device.

---

[1] No counsel for a party authored any part of this brief. Only Amicus and its attorneys paid for the filing and submission of this brief. Pursuant to Supreme Court Rule 37.3(a), all parties consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

This Court has recognized repeatedly that a named plaintiff has a personal, concrete stake in being a class representative, even if her individual claims ultimately become moot. That principle was set out in two landmark decisions more than thirty years ago, and it traces back to precedent even older than that. It flows from—and is compelled by—Article III.

This Court has recognized that diverse and interrelated interests implicate justiciability in the class action context, in part because absent class members have a stake in the outcome of the litigation. This means that the named plaintiff (no less than the absent class members) has a personal stake in class certification even if her individual claims have somehow become moot.

The principle that a proposed class representative has a personal stake in the outcome of class certification, even if her individual claim becomes moot, is critical to the integrity and efficiency of the class action device. Rule 23 sets out a carefully-ordered process that would be disrupted if the class action were mooted whenever a named plaintiff's claim becomes moot. This concern is amplified in cases involving small-value individual claims, where the alternative to a class claim is no claim at all. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the

incentive for any individual to bring a solo action prosecuting his or her rights." (citation omitted)).

Amicus respectfully submits that it is appropriate under *Roper* and *Geraghty* to affirm the United States Court of Appeals for the Ninth Circuit. But Amicus recognizes that these cases do not compel affirmance because neither involved a named plaintiff who voluntarily abandoned his substantive claims. Thus, if the Court reverses the Ninth Circuit, it can and should do so while reaffirming *Roper* and *Geraghty*.

ARGUMENT

I. IT IS WELL-SETTLED THAT FEDERAL COURTS RETAIN JURISDICTION OVER A CLASS ACTION EVEN IF THE NAMED PLAINTIFF'S CLAIMS ARE MOOT.

Under this Court's well-settled precedent, even if a named plaintiff's individual claim becomes moot, the class action as a whole does not. That is because a class representative has a personal stake in representing the class even if the class has not yet been certified. No other rule would comport with Article III.

A. Federal courts have jurisdiction over a class action even if the named plaintiff's claim becomes moot before the class is certified.

In *Deposit Guaranty National Bank v. Roper*, the Court held that an unaccepted offer of judgment to the named plaintiffs did not moot a class action.

445 U.S. at 329-39. This was true even though the district court denied class certification and entered judgment in favor of the named plaintiffs over their objections. *Id.* at 329-30.

The Court recognized that a proposed class representative retains "an economic interest in class certification." *Id.* at 333. Then-Justice Rehnquist concurred to explain that "an *unaccepted* offer of tender in settlement of the individual putative representative's claim" could not moot a class action because "the defendant ha[d] not offered all that ha[d] been requested in the complaint (i.e., relief for the class)[.]" *Id.* at 341. Justice Rehnquist observed that this rule was not only compelled by Article III, it was also sound policy because "any other rule would give the defendant the practical power to make the denial of class certification questions unreviewable." *Id.*

Similarly, in *U.S. Parole Commission v. Geraghty*, the Court held that a proposed named plaintiff has a "personal stake . . . in the right to represent a class" even when his individual claim has expired, such that he can appeal the denial of class certification without undermining "Art[icle] III values." 445 U.S. at 402-04. In such cases, the proposed class representative can "continue[] vigorously to advocate his right to have a class certified" regardless of the status of his personal claim. *Id.* at 404.

Finally, just this Term, this Court, explaining why an unaccepted Rule 68 offer of judgment does not moot an individual claim, observed that "a

would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016). A fair opportunity means the chance to seek class certification even if the named plaintiff's claims become moot.

B. *Roper* and *Geraghty* comport with Article III.

It is well established that Article III requires a plaintiff to have a "personal stake in the outcome of the lawsuit" for a federal court to exercise jurisdiction. *Id.* at 669 (quoting *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013)). If a plaintiff is deprived of that personal stake at any point in the litigation, the case must be dismissed as moot. *Id.*

In an individual lawsuit, the mootness inquiry is straightforward, typically concerned with the redressability of the individual claim, and sometimes with the public interest in the adjudication of certain controversies. *See Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726-27 (2013); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 190-91 (2000). Mootness operates differently in representative litigation because a proposed class representative has a concrete, personal interest in actually being a class representative. *See Geraghty*, 445 U.S. at 400 (observing that the Court's precedents "demonstrate the flexible character of the Art. III mootness doctrine" in the class action context).

1. Once the court grants certification, the existence of a class with live claims "relates back" to the filing of the complaint, meaning that a case or controversy existed throughout the litigation.

The central principle animating *Roper* and *Geraghty* is that a certified class has a legal status independent of the class representative. This is the reason that a certified class does not suddenly evaporate if the named plaintiff's claims become moot.[2] *Roper* and *Geraghty* recognized that the same rule must apply where the named plaintiff's claims become moot before the class has been certified. To hold otherwise would be arbitrary, unfair, and counter to the purposes of Article III because it would prevent the court from ever reaching the live class claims.

Roper and *Geraghty* derived from this Court's earlier decision in *Sosna v. Iowa*, which held that a class action was not moot where the class representative's claim became moot after class certification. 419 U.S. 393, 399 (1975). The Court explained that, upon certification, "the class of unnamed persons . . . acquired a legal status separate from the interest" of the named plaintiff.

---

[2] Nor would class litigation automatically dissolve if a named plaintiff died without a successor in interest. *See* William B. Rubenstein, Newberg on Class Actions § 3:71 (5th ed. 2015) (noting that "[w]hen the estate's representative is deemed inadequate, the court will invite intervention of other class members to bolster the adequacy of representation").

Id; *see also United Airlines, Inc. v. McDonald*, 432 U.S. 385, 393-395 (1977) (holding that a putative class member may intervene, after the named plaintiff's claims have been satisfied, to appeal the denial of class certification).

Because the legal interest satisfies Article III, *Sosna* explained, class certification can be said to "relate back" to the filing of the class complaint if mootness arises *before* certification. 419 U.S. at 402 n.11. Although *Sosna* suggested that the "relation back" doctrine might only apply where the case presents issues capable of repetition but evading review, the Court later made it clear that the doctrine was not so limited. *See Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 754-55 & n.7 (1976) ("[N]othing in . . . . *Sosna* . . . holds or even intimates" a requirement that "there remains an issue 'capable of repetition, yet evading review.'").

The "relation back" doctrine applies where a claim is "so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) (quoting *Geraghty*, 445 U.S. at 399).

That is the case where the individual named plaintiff's claim is moot. If the representative is barred from pursuing class certification, then the question of whether the class should be certified—a question that, if answered in the affirmative, creates a live interest satisfying Article III—will never be answered. Article III should not be applied to allow

concrete, live issues to evade review. *Cf. Roper*, 445 U.S. at 341 (Rehnquist, J., concurring) (explaining that permitting offers of judgment to the named plaintiffs to moot the class action "would give the defendant the practical power to make the denial of class certification questions unreviewable").

2. The rights of the absent class members modify the mootness analysis.

Roper identified "the interests to be considered when questions touching on justiciability are presented in the class-action context." *Id.* at 331. First are interests of the named plaintiffs: "their personal stake in the substantive controversy and their related right as litigants in a federal court to employ in appropriate circumstances the procedural device of a Rule 23 class action to pursue their individual claims." *Id.* Second, "distinct from their private interests, is the responsibility of named plaintiffs to represent the collective interest of the putative class." *Id.* Third are "the rights of putative class members as potential intervenors." And fourth are "the responsibilities of a district court to protect both the absent class and the integrity of the judicial process by monitoring the actions of the parties before it." *Id.*

The *Roper* Court recognized the relevance of these "interrelated" and "diverse" interests. *Id.* Ultimately, however, the Court resolved the case by considering only the private interest of the named plaintiffs, finding that the plaintiffs "retained an economic interest in class certification." *Id.* at 332-

33. Specifically, the Court found a sufficient economic interest in the named plaintiffs' "desire to shift part of the costs of litigation to those who will share in its benefits if the class is certified and ultimately prevails." *Id.* at 336. This economic interest, the Court held, confers Article III standing on the named plaintiffs to represent the absent class members even when the named plaintiffs' individual claims had been dismissed by the court.

3. The purpose of the 'personal stake' requirement is satisfied in a class action even if the named plaintiff's claim is moot.

In the class action context, mootness principles must be applied pragmatically, with an eye to the underlying purposes of Article III. *See Geraghty*, 445 U.S. at 402 ("Determining Art. III's 'uncertain and shifting contours' . . . with respect to nontraditional forms of litigation, such as the class action, requires reference to the purposes of the case-or-controversy requirement.") (quoting *Flast v. Cohen*, 392 U.S. 83, 97 (1986)). In *Geraghty*, the Court explained that "the purpose of the 'personal stake' requirement is to assure that the case is in a form capable of judicial resolution," with "sharply presented issues in a concrete factual settling and self-interested parties vigorously advocating opposing positions." *Id.* at 403.

Both of those conditions can be satisfied in a class action even if the named plaintiff's claim is moot. That is because regardless of the merits of any class members' claim, "[t]he question whether class

certification is appropriate remains as a concrete, sharply presented issue." *Id.* at 403-04. Therefore, so long as the named plaintiff continues "vigorously to advocate his right to have a class certified," she "retains a 'personal stake' in obtaining class certification sufficient to ensure that Art. III values are not undermined." *Id.*

C. This Court's recent opinions are consistent with *Roper* and *Geraghty*.

Roper and *Geraghty* have been well-settled law for decades. Some argue, however, that more recent decisions undermine the Article III principles established in those cases. That is incorrect.

This Court's recent decision in *Genesis Healthcare Corp. v. Symczyk* does not alter the Article III analysis. 133 S. Ct. 1523. In *Genesis*, the issue of whether a resolved individual claim deprives the plaintiff of standing to challenge the denial of class certification was not before the Court. *Id.* at 1529-30. This Court held simply that *if* a plaintiff has no personal interest in the litigation, that case is moot even if the plaintiff seeks to bring a collective action. *Id.* at 1532. The Court also distinguished *Roper* and *Geraghty* by noting that "there are significant differences between certification under Federal Rule of Civil Procedure 23 and the joinder process under § 216(b)." *Id.* at 1527 n.1.

Nor does *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990), call *Roper* into question. *Contra Campbell-Ewald*, 136 S. Ct. at 679 n.1 (Roberts, C.J., dissenting). In *Lewis*, the Court stated that an "interest in attorney's fees is, of course, insufficient

to create an Article III case or controversy where none exists on the merits of the underlying claim[.]" 494 at 480. *Lewis* involved a claim brought by one bank, the merits of which were rendered moot by subsequent legislation. *Id.* at 478. *Lewis* therefore stands only for the proposition that where the merits of an action are moot—where "the only concrete interest in the controversy has terminated," *id.* at 480—a claim for attorney's fees alone will not maintain the court's jurisdiction.

By contrast, in cases like *Roper* and *Geraghty*, although the named plaintiff's claims were moot, the claims of the absent class members were not, and the "controversy" therefore remained live. *Cf. Roper*, 445 U.S. at 341 (Rehnquist, J., concurring) (explaining that the case was not moot because "the defendant has not offered . . . relief for the class").

Even if *Lewis* did undermine the case-specific rationale of *Roper* (that named plaintiffs with mooted claims retain an interest in sharing fees and costs with the class), that rationale was not the main thrust of the Court's holding. Instead, as explained above, the Court identified several "diverse" and "interrelated" interests relevant to justiciability questions in the class-action context, but found it unnecessary to look beyond the narrow private interests of the named plaintiffs to resolve the case. 445 U.S. at 331-32.

Those interests, in particular the need to protect absent class members, undergird the core holdings of *Roper* and *Geraghty*: that a named plaintiff has a personal, concrete stake in actually

being a class representative, whether or not her individual claims ultimately become moot.

II. THE MOOTNESS PRINCIPLES IDENTIFIED IN *ROPER* AND *GERAGHTY* ARE CRITICAL TO THE INTEGRITY AND EFFICACY OF THE CLASS ACTION DEVICE.

Roper and *Geraghty*'s approach to mootness in the class action context is also crucial to preserving the efficient use of class actions. If federal courts were stripped of jurisdiction over class actions whenever the named plaintiffs' claims become moot, the Rule 23 process would be disrupted and its objectives frustrated. That outcome would be particularly harmful to low-value claims, the kinds of cases where class actions are most important *See Amchem*, 521 U.S. at 617.

A. Mooting class actions when absent class members have live claims would disrupt the Rule 23 process.

Rule 23 creates a carefully regulated process for district courts to supervise class actions and protect the interests of absent class members. The central event in that process is the class certification motion.

Making a motion for class certification is not simple because "Rule 23 does not set forth a mere pleading standard." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). This Court has held that "[a] party seeking class certification must affirmatively demonstrate his compliance with the

Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.*

Meeting those requirements often requires substantial evidence, evidence typically in the control of the defendant. Motions practice pre-certification is also common. For example, class certification often involves expert testimony, *see, e.g.*, *Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036 (2016), prompting motions to exclude under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

For that reason, class certification takes time. Rule 23 establishes a court-supervised process that enables the named plaintiffs to marshal the evidence required to meet their burden. The Rule was amended in 2003 to change the time for the certification decisions from "as soon as practicable" to "an early practicable time." Advisory Notes to Rule 23, 2003 Amendments. And district courts have the authority, even before a class is certified, to appoint interim class counsel, Rule 23(g)(3), "impose conditions on the representative parties," Rule 23(d)(C), regulate communications with absent class members, *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101-102 (1981), and deal with other "procedural matters," Fed. R. Civ. P. 23(d)(1)(E).

During the period before a class is certified, the named plaintiffs' claims may become moot, whether through actions of the defendant or simply though the passage of time. Permitting that to moot the class action would disrupt the orderly Rule 23 process, prevent the district court from determining

class certification, and frustrate the objectives of Rule 23. *See Campbell-Ewald*, 136 S. Ct. at 672 ("[A] would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted."); *Roper*, 445 U.S. at 339 ("Requiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions[.]"); *Geraghty*, 445 U.S. at 399 (recognizing as a problem that "the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires.").

B. Mooting class actions would have particularly troubling implications for small-value claims.

As this Court has repeatedly recognized, the class procedure often is most critical in negative-value cases where each individual's claim is too small to justify the expense of an individual action. *See, e.g.*, *Amchem*, 521 U.S. at 617; *Roper*, 445 U.S. at 339 (explaining that "aggrieved persons may be without any effective redress unless they may employ the class-action device"). *Eisen v. Carlise & Jacquelin*, 417 U.S. 156, 161 (1974) ("A critical fact . . . is that petitioner's individual stake . . . is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all."); *see also Carnegie v. Household*

Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.").

The mooting of class actions when absent class members retain justiciable claims threatens to deprive low-value plaintiffs of their "realistic day in court." *Philips Petrol. Co. v. Shutts*, 472 U.S. 797, 809 (1985). As demonstrated in cases like *Roper* and *Campbell-Ewald*, if permitted, defendants will attempt to "pick off" the named plaintiffs by mooting their small individual claims. If successful, defendants will prevent courts from ever reaching the class certification decision, and from ever deciding the merits of the absent class members' claims. *See Roper*, 445 U.S. at 339 ("To deny the right to appeal simply because the defendant has sought to 'buy off' the individual private claims of the named plaintiffs would be contrary to sound judicial administration.").

III. *ROPER* AND *GERAGHTY* SUPPORT AFFIRMANCE IN THIS CASE.

The above analysis warrants affirmance here. The same concerns animating the holdings in *Roper* and *Geraghty* are present here: the risks that class certification will go unreviewed; that the Rule 23 process will be disrupted; and that absent class members' interests' will be unadjudicated and therefore unvindicated. This Court can, and should, apply the principles articulated in *Roper* and *Geraghty* to affirm the judgment below.

It is true, of course, that in *Roper* and *Geraghty*, the named plaintiffs' claims were resolved against their will, either through defendants' actions, or through the passage of time. *See Roper*, 445 U.S. at 332 (emphasizing that "[t]he factual context in which this question arises is important," and stating that "judgment was entered in [plaintiffs'] favor without their consent and the case was dismissed over their continued objections"). Here, the plaintiffs voluntarily dismissed their claims in order to appeal the order striking their class claims from the complaint.

Although Amicus believes that *Roper* or *Geraghty* apply equally here, it recognizes that this Court may disagree. *See Geraghty*, 445 U.S. at 404 n.10 ("We intimate no view as to whether a named plaintiff who settles the individual claim after denial of class certification may, consistent with Art[icle] III, appeal from the adverse ruling on class certification."). For this reason, should the Court reverse, it can and should do so without calling the rule articulated in *Roper* and *Geraghty* into question. *Cf.* Petitioner's Br. at 39-41 (arguing that this case does not implicate *Roper* and *Geraghty*, which "are designed to . . . prevent defendants or the mere passage of time from thwarting potentially meritorious class actions").

CONCLUSION

Amicus respectfully submits that whether it affirms or reverses, the Court should be careful not to disturb the longstanding and important principle that a named plaintiff has a personal, concrete stake

in actually being a class representative, whether or not her individual claims ultimately become moot.

May 23, 2016

Respectfully submitted,

JASON L. LICHTMAN
Counsel of Record

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
MAR 18 2016
OFFICE OF THE CLERK

No. 15-457

IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

v.

SETH BAKER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, NATIONAL ASSOCIATION OF MANUFACTURERS, INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL, AND NFIB SMALL BUSINESS LEGAL CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

CORY L. ANDREWS
Counsel of Record
MARK S. CHENOWETH
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org

March 18, 2016

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether a federal court of appeals has jurisdiction under both Article III and 28 U.S.C. § 1291 to review an order denying class certification after the named plaintiffs voluntarily dismiss their claims with prejudice.

TABLE OF CONTENTS

TABLE OF AUTHORITIES v

INTERESTS OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. THE PARTIES' CONTROVERSY BECAME MOOT WHEN THEY AGREED TO DISMISS THE ENTIRE ACTION, WITH PREJUDICE 9

A. A Justiciable Case Becomes Moot Once There Is No Longer Adversity of Legal Interests 10

B. The Parties' Stipulated Dismissal of the Entire Action, with Prejudice, Destroyed the Requisite Adversity Under Article III 12

II. THE NINTH CIRCUIT'S FLAWED APPROACH TO APPELLATE JURISDICTION UNDERMINES THIS COURT'S UNANIMOUS HOLDING IN *LIVESAY* 16

A. The Holding Below Contravenes *Livesay*'s Policy Against Piecemeal Appeals 18

B. The Holding Below Improperly Favors Plaintiffs over Defendants .. 20

III. THE NINTH CIRCUIT'S EXPANSIVE READING OF § 1291 IS INCONSISTENT WITH THE PROPER UNDERSTANDING OF THE STATUTE 21

IV. THE NINTH CIRCUIT'S HOLDING IS INCONSISTENT WITH A PLAIN READING OF FED. R. CIV. P. 23(f) 23

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

CASES

Allen v. McCurry,
449 U.S. 90 (1980) 13

Already, LLC v. Nike, Inc.,
133 S. Ct. 721 (2013) 11

Alvarez v. Smith,
558 U.S. 87 (2009) 11

Arizonans for Official English v. Arizona,
520 U.S. 43 (1997) 11, 16

Berger v. Home Depot USA, Inc.,
741 F.3d 1061 (9th Cir. 2014) 5, 6

Camesi v. Univ. of Pittsburgh Med. Ctr.,
729 F.3d 239 (3d. Cir. 2013) 14

Campbell-Ewald Co. v. Gomez,
136 S. Ct. 663 (2016) 10, 11

Cent. Trans. Co. v. Pullman's Palace Car Co.,
139 U.S. 24 (1891) 15

Clapper v. Amnesty Int'l,
133 S. Ct. 1138 (2013) 1

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) ..... *passim*

Page(s)

Dart Cherokee Basin Operating Co. v. Owens,
135 S. Ct. 547 (2014) 1

Deakins v. Monaghan,
484 U.S. 193 (1988) 14, 15

Deposit Guar. Nat'l Bank v. Roper,
445 U.S. 326 (1980) 16

Druhan v. Am. Mut. Life,
166 F.3d 1324 (11th Cir. 1999) 14

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974) 3

Evans v. Phillips,
17 U.S. (4 Wheat.) 73 (1819) 15

Flast v. Cohen,
392 U.S. 83 (1968) 10

Gardner v. Westinghouse Broad. Co.,
437 U.S. 478 (1978) 10

Goodyear Dunlop Tires Operations, S.A. v. Brown,
131 S. Ct. 2846 (2011) 1

Hall v. Beals,
396 U.S. 45 (1969) 14

Harrison v. Edison Bros. Apparel Stores, Inc.,
924 F.2d 530 (4th Cir. 1991) 13

Page(s)

Hertz Corp. v. Friend,
559 U.S. 77, 94 (2010) 21

Honig v. Doe,
484 U.S. 305 (1988) 14

Lewis v. Cont'l Bank Corp.,
494 U.S. 472 (1990) 12

Marshall v. Sielaff,
492 F.2d 917 (3d Cir. 1974) 19

Moore v. Charlotte-Mecklenburg Bd. of Educ.,
402 U.S. 47 (1971) 12

Murphy v. Hunt,
455 U. S. 478 (1982) 11

Nashville, C. & St. L. Ry. Co. v. United States,
113 U.S. 261 (1885) 15

O'Shea v. Littleton,
414 U.S. 488 (1974) 11, 14

Sanders v. United States,
373 U.S. 1 (1963) 16

Semtek Int'l Inc. v. Lockheed Martin Corp.,
531 U.S. 497 (2001) 13

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010) 20

Page(s)

Standard Fire Ins. Co. v. Knowles,
133 S. Ct. 1345 (2013) 1

Sullivan v. Pac. Indem. Co.,
566 F.2d 444 (3d Cir. 1977) 19

Switzerland Cheese Ass'n, Inc. v.
E. Horne's Market, Inc., 385 U.S. 23 (1966) 10

United States v. Babbitt,
104 U.S. 767 (1881) 15

United States v. Evans,
9 U.S. (5 Cranch) 280 (1809) 15

United States v. Hamburg-Amerikanische
Packetfahrt-Actien Gesellschaft,
239 U.S. 466 (1916) 12

United States v. Procter & Gamble Co.,
356 U.S. 677 (1958) 15, 21

United States Parole Comm'n v. Geraghty,
445 U.S. 388 (1980) 16

U.S. Bancorp Mortgage Co. v.
Bonner Mall P'ship, 513 U.S. 18 (1994) 12, 15

Warfield v. Allied Signal TBS Holdings, Inc.,
267 F.3d 538 (6th Cir. 2001) 13

Will v. Hallock,
546 U.S. 345 (2006) 18

Page(s)

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. III, § 2 ..... *passim*

STATUTES

28 U.S.C. § 1291 ..... *passim*

28 U.S.C. § 2072(c) 25

RULES

Fed. R. App. P. 4(a)(1)(A) 24

Fed. R. Civ. P. 23 ..... 3, 23

Fed. R. Civ. P. 23(f) ..... *passim*

Fed. R. Civ. P. 41 13

Fed. R. Civ. P. 41(a)(1)(A)(i) 9

Sup. Ct. R. 37.6 1

OTHER SOURCES

Rebecca A. Cochran, *Gaining Appellate Review by "Manufacturing" A Final Judgment Through Voluntary Dismissal of Peripheral Claims*, 48 Mercer L. Rev. 979 (1997) 13

INTERESTS OF *AMICI CURIAE*[1]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF has frequently appeared in this Court in cases recognizing limitations on the power of federal courts to exercise either subject-matter or personal jurisdiction over parties and proceedings. *See, e.g.*, *Clapper v. Amnesty Int'l*, 133 S. Ct. 1138 (2013); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011). In addition, WLF has long opposed procedural gamesmanship by the plaintiffs' bar in federal class-action litigation. *See, e.g.*, *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014); *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013).

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic

---

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties to this dispute have consented to the filing of this brief, and letters of consent have been lodged with the Court.

impact of any major sector, and accounts for two-thirds of private-sector research and development. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

The International Association of Defense Counsel (IADC) is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, culpable defendants are held liable for appropriate damages, and non-culpable defendants are exonerated and can defend themselves without unreasonable costs.

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public-interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, DC, and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents 325,000 member businesses nationwide, and its

membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

Amici strongly support faithful adherence to the jurisdictional statutes Congress has enacted to prevent multiple, piecemeal appeals from a single district court proceeding. By strictly limiting the occasions in which a party may appeal an adverse ruling, those federal appellate rules "prevent[] the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974).

Amici are concerned that affirmance of the decision below would seriously undermine judicial administration by effectively providing plaintiffs an absolute right to immediate review of a district court order denying a motion to certify a plaintiffs' class under Rule 23. Indeed, such a decision could well result in numerous appeals from a single action. Affording appeals-as-of-right to unsuccessful class-certification movants not only contravenes 28 U.S.C. § 1291, which manifests Congress's longstanding policy against multiple, piecemeal appeals, but it also undermines Rule 23(f), which permits

immediate appeals from class certification orders at the sole discretion of the appeals court. And whereas Rule 23(f) applies regardless of which side lost the class certification issue, the Ninth Circuit's voluntary dismissal tactic benefits only plaintiffs.

STATEMENT OF THE CASE

Article III, § 2 of the Constitution extends the "judicial power" of the United States to only "Cases" and "Controversies." At the same time, Congress has granted the courts of appeals "jurisdiction of appeals from all final decisions of the district courts of the United States," subject to limited exceptions. 28 U.S.C. § 1291. At issue here is whether respondents satisfied the requirements of both Article III and §1291, thereby providing the Ninth Circuit with jurisdiction in this case to review the district court's order striking respondents' class allegations from the complaint.

Petitioner Microsoft Corporation (Microsoft) is a leading technology company that develops, manufactures, and sells the Xbox 360 video game console. Respondents are five individuals who, in 2011, brought a putative class-action lawsuit against Microsoft alleging defective design of the Xbox 360 and requesting certification of a nationwide class of all similarly situated purchasers.[2]

---

[2] In 2007, the same lawyers representing respondents in this case brought a nearly identical class action against Microsoft (also in the Western District of Washington). *See* Pet. App. 6a-8a. When the district court denied class certification, those plaintiffs unsuccessfully petitioned the Ninth Circuit for interlocutory appeal under Rule 23(f). When the Ninth Circuit

On March 27, 2012, on Microsoft's motion, the U.S. District Court for the Western District of Washington struck respondents' class allegations from the complaint on the basis that causation and damages could not be proven in one stroke by common evidence. Invoking Rule 23(f), respondents petitioned the Ninth Circuit to grant an interlocutory appeal of the district court's order. Exercising its discretion under Rule 23(f) to grant or deny such petitions, the Ninth Circuit denied appellate review, leaving the plaintiffs to pursue their individual claims on the merits in the district court. Pet. App. 10a.

Rather than pursue their individual claims to finality, respondents moved to voluntarily dismiss their claims with prejudice, declaring their intention to appeal the district court's order striking the complaint's class allegations. Pet. App. 36a. Although Microsoft agreed to the district court's dismissal of respondents' claims with prejudice, Microsoft also maintained that respondents had no right to appeal the court's striking of class allegations following the voluntary dismissal with prejudice. *Ibid.* "[R]eserving to all parties their arguments as to the propriety of any appeal," the district court dismissed respondents' claims with prejudice. *Id.* at 36a-37a.

Exercising jurisdiction over respondents' appeal, the Ninth Circuit reversed. The panel rejected Microsoft's jurisdictional argument solely on

---

denied the petition, those plaintiffs agreed to resolve their individual claims with Microsoft.

the basis of *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061 (9th Cir. 2014), a decision handed down after the appeal in the instant case was fully briefed. Pet. App. 11a-12a. The panel did not address whether respondents—following their voluntary dismissal of all claims, with prejudice—maintained sufficient legal stake in the action to satisfy the case-or-controversy requirement under Article III. Nor did the panel address Microsoft's contention that the interlocutory order striking class allegations was not a "final decision" within the meaning of § 1291. Instead, the panel determined that the only relevant issue under was whether respondents' voluntary dismissal of their claims deprived their appeal of the requisite "adversity." *Ibid.*

The panel concluded that respondents possessed sufficient adversity to warrant exercise of appellate jurisdiction, noting that *Berger* had rejected just such an absence-of-adversity contention:

> [*Berger*] distinguished a stipulated dismissal without a settlement from a stipulated dismissal with a settlement. The former retains sufficient adversity to sustain an appeal. The latter does not. As this case did not involve settlement, *Berger* establishes that "[we] have jurisdiction under 28 U.S.C. § 1291 because a dismissal of an action with prejudice, even when such dismissal is the product of a stipulation, is a sufficiently adverse—and thus appealable—final decision."

Pet. App. 12a (quoting *Berger*, 741 F.3d at 1064, 1065).

Turning to the availability of a class action, the panel concluded that the district court abused its discretion in striking the class allegations from the complaint. Pet. App. 19a. At the same time, the panel expressed no opinion "on whether the specific common issues identified in this case are amenable to adjudication by way of a class action, or whether plaintiffs should prevail on a motion for class certification." *Ibid.* Nor did the panel even attempt to address how the district court should proceed in the absence of any putative class representative with a live, justiciable claim—all five respondents having voluntarily dismissed their individual claims with prejudice. The panel reversed the district court's order and remanded for further proceedings consistent with its opinion.

Microsoft's petition for rehearing en banc was denied. Pet. App. 5a. This Court granted certiorari.

SUMMARY OF ARGUMENT

The panel below held that a district court's adverse class determination becomes an immediately appealable, final order when the district court dismisses the action with prejudice—even when such dismissal results from the plaintiffs' own motion and disposes of *all* claims in the litigation. As shown below, the Ninth Circuit's decision constitutes a sharp departure from many of this Court's long-settled precedents and should be reversed.

As a preliminary matter, this case no longer presents a justiciable case or controversy because

respondents voluntarily dismissed all of their claims, with prejudice, rendering any appeal moot. Neither party contends that the district court erred in entering its final judgment disposing of the action with prejudice—respondents specifically requested it, and Microsoft wisely agreed to it. As a result of that invited dismissal, to which *all parties* stipulated, Article III's adversity requirement is utterly lacking, and a live dispute between the parties no longer exists to support federal subject-matter jurisdiction—appellate, or otherwise.

But even assuming that Article III is somehow satisfied, the panel's holding is utterly inconsistent with this Court's landmark decision in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978), which held that allowing a plaintiff to appeal a class certification denial immediately as of right, rather than from a final judgment after an adverse trial on the merits, violates Congress's longstanding policy against multiple, piecemeal appeals. Such appeals are impermissible, the Court explained, even when the denial of class certification tolls the "death knell" for the plaintiffs' entire case.

In addition, the panel's untethered, expansive reading of 28 U.S.C. § 1291 is wholly inconsistent with the proper understanding of that statute. As this Court has recognized, Congress adopted § 1291's "final decision" rule to ensure that controversies are not reviewed by appellate courts in a piecemeal fashion such as this. But the Ninth Circuit's decision undermines § 1291 by permitting, and thus encouraging, more and more piecemeal appeals. It also creates unfairness by effectively granting plaintiffs—but *not* defendants—an absolute right to

immediate review of adverse class-certification orders.

Lastly, under respondents' self-serving view of § 1291, plaintiffs effectively will get *at least* two (rather than one) appeals from adverse class certification rulings, thereby multiplying their chances of encountering a sympathetic panel. Such a result contravenes Federal Rule of Civil Procedure 23(f), which grants both plaintiffs *and* defendants the right to *request* interlocutory review of class-certification orders, but provides appeals courts with absolute, unreviewable discretion to deny the request. If the Court were to adopt the reasoning of the Ninth Circuit, Rule 23(f) would be rendered a dead letter.

ARGUMENT

I. THE PARTIES' CONTROVERSY BECAME MOOT WHEN THEY AGREED TO DISMISS THE ENTIRE ACTION, WITH PREJUDICE

Well-settled mootness principles control the outcome of this case. After the Ninth Circuit denied respondents' Rule 23(f) petition for interlocutory review of the district court's order striking respondents' class allegations from the complaint, respondents promptly moved "that this action be dismissed with prejudice, with all parties to bear their own costs and fees." J.A. 122. Microsoft stipulated to that dismissal, acknowledging that respondents had the right to voluntarily dismiss the action under Rule 41(a)(1)(A)(i), but pointing out that respondents would be barred from any further appeal. Pet. App. 36a.

Appellate jurisdiction requires not only an appeal from a final order under 28 U.S.C. § 1291, but also the existence of an actual case or controversy under Article III. On appeal, respondents sought review of only the order striking their class allegations from the complaint; they did not complain of the "final" order that dismissed all of their claims with prejudice. Yet the district court's order striking class allegations had "no direct or irreparable impact on the merits of the controversy" and instead "only relate[d] to pretrial procedures." *Gardner v. Westinghouse Broad. Co.*, 437 U.S. 478, 482 (1978) (quoting *Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 24 (1966)). Therefore, to the extent that respondents now seek to appeal from the district court's final judgment against them—a judgment that extinguished all of their claims at their own invitation—this Court's precedents make clear that respondents no longer enjoy sufficient legal adversity in the action to satisfy Article III's case-or-controversy requirement.

A. A Justiciable Case Becomes Moot Once There Is No Longer Adversity of Legal Interests

Article III, § 2 of the Constitution extends the "judicial Power" of the United States to only "Cases" and "Controversies." U.S. Const. art. III, § 2. This bedrock jurisdictional requirement ensures that the federal judiciary confines itself to its constitutionally limited role of adjudicating "actual and concrete" disputes. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016). The central function of Article III's case-or-controversy requirement is to "limit the business of federal courts to questions presented in

an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

Among other things, Article III's case-or-controversy requirement requires that "an actual controversy ... be extant at all stages of review, not merely at the time the complaint is filed." *Campbell-Ewald*, 136 S. Ct. at 669 (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)). A case becomes moot, and therefore no longer a case or controversy for purposes of Article III, "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Murphy v. Hunt*, 455 U. S. 478, 481 (1982) (per curiam); *Campbell-Ewald*, 136 S. Ct. at 669 (an action becomes moot when "an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point in the litigation") (internal citation and quotation omitted).

A central focus of this Court's case-or-controversy requirement has been the presence of adversity. The clash between adverse parties "sharpens the presentation of issues upon which the court so largely depends for illumination of difficult ... questions." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). A justiciable controversy is one that touches not merely the parties' adverse interests but their adverse *legal* interests. Stated differently, "[n]o matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute 'is no longer embedded in any actual controversy about the plaintiffs' particular legal

rights.'" *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013) (quoting *Alvarez v. Smith*, 558 U.S. 87, 93 (2009)).

This Court has long "disposed of moot cases in the manner 'most consonant to justice' ... in view of the nature and character of the conditions which have caused the case to become moot." *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994) (quoting *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 477-78 (1916)). The "principal condition" to which the Court has looked is "whether the party seeking relief from the judgment below caused the mootness by voluntary action." *Ibid.* Accordingly, where the parties request "precisely the same result" from the court, there is no adversity, and therefore no Article III case or controversy. *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 47-48 (1971) (holding that no Article III case or controversy exists where both parties urged that the district court's desegregation order be set aside).

B. The Parties' Stipulated Dismissal of the Entire Action, with Prejudice, Destroyed the Requisite Adversity Under Article III

Respondents' claims over Microsoft's alleged defective design of the Xbox 360 ceased to be justiciable when respondents voluntarily dismissed those claims, with prejudice. Because "Article III denies federal courts the power to decide questions that cannot affect the rights of litigants in the case before them," *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990), respondents' abandonment of their

individual claims cannot be reviewed on appeal. As a result of respondents' invited dismissal, to which *all parties* stipulated, Article III's adversity requirement is utterly lacking, and a live dispute between the parties no longer exists to support federal subject-matter jurisdiction—appellate or otherwise.

Voluntary dismissals are governed by Rule 41, which provides for the "voluntary dismissal" of an "action." *See* Fed. R. Civ. P. 41. This Court has interpreted a plaintiff's voluntary dismissal "with prejudice" under Rule 41 as equivalent to an "adjudication upon the merits," which is ordinarily subject to res judicata. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001); *Warfield v. Allied Signal TBS Holdings, Inc.*, 267 F.3d 538, 542 (6th Cir. 2001) ("A voluntary dismissal with prejudice operates as a final adjudication on the merits and has a res judicata effect."); *Harrison v. Edison Bros. Apparel Stores, Inc.*, 924 F.2d 530, 534 (4th Cir. 1991) (holding that a voluntary dismissal with prejudice "is a complete adjudication on the merits of the dismissed claim[s]").[3]

---

[3] Even in those cases where plaintiffs voluntarily dismiss only peripheral claims to "manufacture" an appeal, "[t]he distinction between dismissal with and without prejudice is crucial." Rebecca A. Cochran, *Gaining Appellate Review by "Manufacturing" A Final Judgment Through Voluntary Dismissal of Peripheral Claims*, 48 Mercer L. Rev. 979, 1009 (1997). "Ignoring labels and searching for intent replaces district court certainty with uncertainty and speculation. ... When appellate courts ignore or disregard the label assigned to the dismissal and simply search the record for intent as the real indicia of finality, the appellate process breaks down." *Ibid.*

Under this Court's precedents, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). "Once that litigation is dismissed with prejudice, it cannot be resumed in this or any subsequent action." *Deakins v. Monaghan*, 484 U.S. 193, 201 n.4 (1988) (deeming moot a case where plaintiffs were "barred from reviving" their claims "in federal court" following their voluntary dismissal with prejudice). Because respondents cannot possibly rekindle their claims against Microsoft, no "speculative contingency" exists that is "sufficiently real and immediate to show an existing controversy." *Id.* at 201 & n.4 (citing *Hall v. Beals*, 396 U.S. 45, 49 (1969); *O'Shea*, 414 U.S. at 496).

This case has "therefore lost its character as a present, live controversy of the kind that must exist if [this Court is] to avoid advisory opinions." *Beals*, 396 U.S. at 48; *Honig v. Doe*, 484 U.S. 305, 317 (1988) ("That the dispute between the parties was very much alive when suit was filed ... cannot substitute for the actual case or controversy that an exercise of this Court's jurisdiction requires."); *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 247 (3d. Cir. 2013) (dismissing appeal as moot because "[t]he claims that Appellants dismissed with prejudice are gone forever—they are not reviewable by this Court and may not be recaptured at the district court level"); *Druhan v. Am. Mut. Life*, 166 F.3d 1324 (11th Cir. 1999) (dismissing appeal as moot where the "required adverseness is lacking" because "final judgment was entered in response to the plaintiff's motion for a dismissal with prejudice").

In light of these principles, an unbroken line of this Court's decisions stretching back to 1809 has firmly established that a plaintiff cannot appeal the propriety of a dismissal with prejudice to which he consented. *See Bancorp*, 513 U.S. at 25 ("Where mootness results from [the parties' agreement] ... the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari."); *Deakins*, 484 U.S. at 200 ("Because this [dispute] was rendered moot in part by [plaintiffs'] willingness permanently to withdraw their equitable claims from their federal action, a dismissal with prejudice is indicated."); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 680 (1958) (acknowledging the "familiar rule that a plaintiff who has voluntarily dismissed his complaint may not sue out a writ of error"); *Cent. Trans. Co. v. Pullman's Palace Car Co.*, 139 U.S. 24, 39 (1891) ("[A] plaintiff, who appears by the record to have voluntarily become nonsuit, cannot sue out a writ of error."); *Nashville, C. & St. L. Ry. Co. v. United States*, 113 U.S. 261, 266 (1885) ("[T]he insurmountable difficulty is that the former decree appears upon its face to have been rendered by consent of the parties, and could not therefore be reversed, even on appeal."); *United States v. Babbitt*, 104 U.S. 767, 768 (1881) ("The consent to the judgment below was in law a waiver of any error now complained of."); *Evans v. Phillips*, 17 U.S. (4 Wheat.) 73, 74 (1819) ("A writ of error will not lie on a judgment of nonsuit."); *United States v. Evans*, 9 U.S. (5 Cranch) 280, 280 (1809) ("It is not ground for a writ of error that the judge below refused to reinstate a cause after nonsuit.").

Respondents invited, then stipulated to,

dismissal of their entire action with prejudice. Because "to qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review," this action is moot, and respondents may not appeal from the judgment or any other order below. *Arizonans*, 520 U.S. at 67. This is merely a further "application of the principle that '[a] suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.'" *Bancorp*, 513 U.S. at 25 (quoting *Sanders v. United States*, 373 U.S. 1, 17 (1963)).[4]

II. THE NINTH CIRCUIT'S FLAWED APPROACH TO APPELLATE JURISDICTION UNDERMINES THIS COURT'S UNANIMOUS HOLDING IN *LIVESAY*

The Ninth Circuit has essentially justified its rule with a "big risk/big reward" rationale. That is, a

---

[4] This is not a case in which the defendant voluntarily ceased its own conduct in an attempt to undermine plaintiffs' continuing stake in the outcome of the litigation. *See, e.g.*, *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980). Both *Roper* and *Geraghty* turned on the critical fact that the events giving rise to the defendants' mootness allegations were engineered by the defendants and were not (as here) voluntarily initiated and stipulated to by the plaintiffs. As Chief Justice Burger explained in *Roper*, the fact that the plaintiffs opposed the order of dismissal was an important factor in the Court's determination that the plaintiffs' post-judgment appeal from the denial of class-certification was not moot, because ordinarily a party cannot appeal from a dispositive order that it instigated. *Roper*, 445 U.S. at 332 (emphasizing that the "factual context in which this question arises is important" because the "judgment was entered in [the plaintiffs'] favor by the court without their consent, and the case was dismissed over their continued objections").

plaintiff who is willing to risk his entire lawsuit on a bet that he can get the pre-trial order reversed on appeal ought to be rewarded by being permitted to use the gimmick of a voluntary dismissal with prejudice to obtain immediate appellate review. Not only does that rationale enjoy no support in this Court's precedents, but it actively cuts against this Court's unanimous holding in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), which held that orders concerning class certification are not appealable final orders under 28 U.S.C. § 1291.

In *Livesay*, the Court examined and rejected the "death knell" doctrine, under which several courts of appeals had exercised jurisdiction over appeals from district court orders that did not resolve all issues in the case. *See Livesay*, 437 U.S. at 475. Under that doctrine, when deciding whether to exercise appellate jurisdiction, some appeals courts examined the impact of the district court order on the individual case. If those courts concluded that the costs of trying the individual's case so exceeded the potential judgment (considering the plaintiff's resources) that further pursuit of the plaintiff's claim was improbable, the order was deemed a "final decision" and thus subject to federal appellate jurisdiction under § 1291.

In rejecting the "death knell" doctrine as a basis for permitting appeals from orders denying class certification, the Court explained that Congress adopted § 1291's "final decision" rule to ensure that controversies are not reviewed by appellate courts in a piecemeal fashion. *Livesay*, 437 U.S. at 473. Recognizing the potential for abusive, frivolous appeals, this Court concluded that the doctrine

"would have a serious debilitating effect on the administration of justice" by permitting "multiple appeals" within a single case. *Id.* at 473-74. Most relevant here, the Court was critical of the fact that "the doctrine operates only in favor of plaintiffs even though the class issue—whether to certify, and if so, how large the class should be—will often be of critical importance to defendants as well." *Id.* at 476.

The holding below thus creates an anomaly by affording greater opportunity for plaintiffs than defendants to obtain judicial review of an adverse class-certification determination. Inviting such an untoward result undermines this Court's clear precedent and does violence to the entrenched policy opposing piecemeal review. That "finality" rule, which derives from the Judiciary Act of 1791, promotes judicial efficiency and deters "the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise." *Will v. Hallock*, 546 U.S. 345, 350 (2006) (internal quotations omitted).

A. The Holding Below Contravenes *Livesay*'s Policy Against Piecemeal Appeals

Congress's longstanding policy against piecemeal appeals, which animated the *Livesay* Court's construction of § 1291 in the context of class-certification appeals filed *before* entry of a final judgment, applies with equal force in the context of class-certification appeals filed *after* a voluntary dismissal with prejudice, which manifests the named plaintiffs' refusal to proceed to trial on their individual claims. As a practical matter, if § 1291

were interpreted to permit a plaintiff to obtain immediate review of every adverse class-determination order by procuring a dismissal with prejudice, it would render the venerable policy against piecemeal appellate review a dead letter.

It is impossible to overstate the mischief that the Ninth Circuit's novel approach to appellate jurisdiction would foment if left undisturbed. As the Third Circuit has warned in a very similar context:

> If a litigant could refuse to proceed whenever a trial judge ruled against him, wait for the court to enter a dismissal for failure to prosecute, and then obtain review of the judge's interlocutory decision, the policy against piecemeal litigation and review would be severely weakened. This procedural technique would in effect provide a means to avoid the finality rule embodied in 28 U.S.C. § 1291. To review the district court's [order] ... under the facts of this case is to invite the inundation of appellate dockets with requests for review of interlocutory orders and to undermine the ability of trial judges to achieve the orderly and expeditious disposition of cases.

Sullivan v. Pac. Indem. Co., 566 F.2d 444, 445-46 (3d Cir. 1977) (citing *Marshall v. Sielaff*, 492 F.2d 917, 919 (3d Cir. 1974)).

Here, as in *Livesay*, "allowing appeals of right from orders that turn on the facts of a particular

case thrusts appellate courts indiscriminately into the trial process and thus defeats one vital purpose of the final-judgment rule—that of maintaining the appropriate relationship between the respective courts." *Livesay*, 437 U.S. at 476. Unless this Court reverses the misguided decision below, that "vital purpose" will be abandoned entirely.

B. The Ninth Circuit's Holding Improperly Favors Plaintiffs over Defendants

By adopting a one-sided rule that favors plaintiffs over defendants, the panel decision conflicts with *Livesay*, which cautioned that rules governing appellate review ought to treat plaintiffs and defendants even-handedly. *Livesay*, 437 U.S. at 476 (rejecting the "death knell" doctrine in part because "the doctrine operates only in favor of plaintiffs").

Class-certification decisions severely impact defendants as well as plaintiffs. Indeed, a decision to certify a class can just as readily sound the "death knell" of a class-action defense. As *Livesay* recognized, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense. Yet the Courts of Appeals have correctly concluded that orders granting class certification are interlocutory." *Ibid.*

It is no secret that a "court's decision to certify a class ... places pressure on the defendant to settle even unmeritorious claims." *Shady Grove*

Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting). Whereas "administrative simplicity is a major virtue in a jurisdictional statute," the voluntary dismissal tactic embraced by the Ninth Circuit is more likely to result in multiple appeals and protracted litigation, which not only invite procedural "gamesmanship, [but] diminish the likelihood that results and settlements will reflect a claim's legal and factual merits." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

Even so, the panel below created a pathway for plaintiffs by which they can always obtain pre-trial appellate review of class-certification orders without creating a similar pathway for defendants. That is patently unfair, and this Court should reverse the deeply flawed decision below.

III. THE NINTH CIRCUIT'S EXPANSIVE READING OF § 1291 IS INCONSISTENT WITH THE PROPER UNDERSTANDING OF THE STATUTE

This is not a case where plaintiffs previously "lost on the merits" and now "only seek" an "expeditious review." *See Procter & Gamble Co.*, 356 U.S. at 681. Barring such circumstances, the Ninth Circuit opinion fails to explain how an interlocutory order effectively denying class certification can be suddenly transformed into a "final decision" within the meaning of 28 U.S.C. § 1291 when the district court enters a stipulated order dismissing the entire case with prejudice.

Simply put, "the fact that an interlocutory order may induce a party to abandon his claim

before final judgment is not a sufficient reason for considering it a 'final decision' within the meaning of § 1291." *Livesay*, 437 U.S. at 476. The panel's contrary reading of 28 U.S.C. § 1291 is inconsistent with the very purpose of that statute. As this Court recognized in *Livesay*, Congress adopted § 1291's "final decision" rule to ensure that controversies are not reviewed by appellate courts in a piecemeal fashion as issues arise. The decision below undermines § 1291 by effectively granting plaintiffs (but not defendants) an absolute right to immediate review of adverse class-certification orders.

Orders denying class certification do *not* merge into the judgment (and thus become reviewable in an appeal under § 1291 from the final order of dismissal) when the final order of dismissal results from the plaintiffs' refusal to prosecute their claims. A contrary view would allow plaintiffs to use the dismissal order they procured as a vehicle to circumvent finality principles and secure piecemeal review of an interlocutory procedural ruling on class certification. By failing to address that issue, the panel implicitly adopted an expansive view of federal appellate jurisdiction that is inconsistent with longstanding notions of finality.

Nor is there any principled way to limit an affirmance solely to interlocutory class-certification decisions. Under the same reasoning adopted by the Ninth Circuit, any time a plaintiff is dissatisfied with a discovery or other interlocutory order, he can simply dismiss all his claims, take an appeal, and obtain immediate review of the order. Sanction orders, discovery orders, even evidentiary orders on

motions in limine, could all be appealed by this artifice. Permitting litigants to undertake piecemeal appeals whenever they disagree with adverse interlocutory decisions would unduly delay the resolution of district court litigation and needlessly burden the courts of appeals—precisely the outcome that § 1291 forecloses.

IV. THE NINTH CIRCUIT'S HOLDING IS INCONSISTENT WITH A PLAIN READING OF FED. R. CIV. P. 23(f)

The panel decision is also inconsistent with Rule 23(f), which grants both plaintiffs and defendants the right to *request* interlocutory review of class-certification orders but provides federal appellate courts unreviewable discretion to deny such requests. By conjuring a means by which plaintiffs can essentially appeal class-certification orders as of right, the decision below undermines Congress's directive that the appeals courts' acceptance of such appeals must be discretionary. *See* Advisory Committee Notes Accompanying 1998 Amendments to Rule 23 ("The court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari. ... Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive.").

This case starkly demonstrates the utter incoherence of Rule 23(f) under the Ninth Circuit's view. Here, the Ninth Circuit granted respondents an appeal-as-of-right, even though a different panel of that court had previously rejected their Rule 23(f)

request for an interlocutory appeal from the district court's order striking all class allegations from the complaint. The first appeals court panel's discretion under Rule 23(f) to reject an interlocutory request was therefore no longer unreviewable once a second appellate panel was permitted to second-guess that discretionary denial. As a result, not only can plaintiffs (but not defendants) in the Ninth Circuit obtain an interlocutory appeal-as-of-right, but plaintiffs also can effectively get *at least* two appeals (rather than one) from adverse class-certification rulings, thereby multiplying their chances of encountering a sympathetic panel.[5]

The Ninth Circuit's holding also effectively eliminates Rule 23(f)'s directive that petitions for interlocutory appeals be filed expeditiously. While 23(f) requires such petitions to be filed within 14 days after the adverse order on class determination is entered, the decision below permits plaintiffs to delay their appeal until up to 30 days after entry of the stipulated dismissal with prejudice—a dismissal that may well be entered months after a class certification ruling, as was the case here. *See* Fed. R. App. P. 4(a)(1)(A) (providing that "the notice of appeal ... must be filed with the district court within 30 days after entry of the judgment or order appealed from").

---

[5] By merely reversing the order striking class allegations, but expressly declining to evaluate the suitability of class certification, *see* Pet. App. 19a, the Ninth Circuit's ruling in this case creates the strong likelihood of a *third* appeal. When the district court eventually rules (yet again) on the suitability of class certification, the party opposing that ruling will almost certainly appeal to the Ninth Circuit.

Rule 23(f) was promulgated in reaction to *Livesay* to give courts unfettered discretion to hear appeals of class-certification rulings, but the rulemakers quite pointedly did not exercise their authority under 28 U.S.C. § 2072(c) to define such rulings as "final" orders appealable as a matter of right under § 1291. The Ninth Circuit, in contrast, holds that a district court's adverse class determination becomes an immediately appealable, final order even when the district court dismisses the entire action *with prejudice*—at the plaintiff's invitation. Not even under the strictly construed collateral-order doctrine—a narrow exception to the final-judgment rule—do courts countenance such a significant departure from settled principles of finality. *See Livesay*, 437 U.S. at 468-70.

CONCLUSION

For the foregoing reasons, *amici curiae* Washington Legal Foundation, National Association of Manufacturers, International Association of Defense Counsel, and National Federation of Independent Business Small Business Legal Center, respectfully request that the Court reverse the decision below.

Respectfully submitted,

CORY L. ANDREWS
Counsel of Record
MARK S. CHENOWETH
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, D.C. 20036
(202) 599-0302
candrews@wlf.org

March 18, 2016